Thera Agri Capital No 2 v BCC Trade Credit t/as the Bond & Credit Co - [2022] NSWSC 669

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Supreme Court

New South Wales

- Amendment notes

Medium Neutral Citation:	**Thera Agri Capital No 2 Pty Ltd v BCC Trade Credit Pty Ltd t/as The Bond & Credit Co [2022] NSWSC 669**
Hearing dates:	21-23 March 2022
Date of orders:	31 May 2022
Decision date:	31 May 2022
Jurisdiction:	Equity - Commercial List
Before:	Rees J
Decision:	Judgment for the plaintiff in the amount of $7,224,043.04.
Catchwords:	INSURANCE – trade credit insurance, description at [2] – financier insured for default of customer's guarantor – construction of insurance policy, principles at [135]-[144] – construction of defined terms, principles at [145]-[147] – relevance of post-contractual conduct at [149]. SHIPPING – bills of lading – "to order" – negotiable bills – principles at [78]-[79] – significance of "notify party" at [80]. FINANCE – supply chain finance to commodities trader – Sharia-compliant Murabaha facility, description at [21] –

trader submits sham commodity contracts in support of drawdown requests – financier and trader did not strictly comply with finance documents when advancing funds – transactions not Sharia-compliant – trader goes into liquidation – guarantor defaults – insurer denied indemnity on basis of non-compliance with Sharia principles and finance documents.

PRIVATE INTERNATIONAL LAW – choice of law clause in favour of New South Wales (NSW) law – non-exclusive jurisdiction clause in favour of the Dubai International Financial Centre (DIFC) in United Arab Emirates (UAE) – policy required insured to comply with "applicable material laws" – DIFC would apply chosen law – arguable in DIFC that NSW law displaced by public policy of UAE – where public policy of UAE based on Sharia principles of Islamic law – UAE public policy not "applicable material law" within the meaning of the policy.

WORDS AND PHRASES – "material", "material default", "applicable material laws" at [186]-[188], [209].

Legislation Cited:

Civil Code (UAE)

DIFC Law No 3 of 2004 on the Application of Civil and Commercial Laws of the DIFC (UAE)

Federal Law No 8 of 2004 regarding the Financial Free Zones (UAE)

Insurance Contracts Act 1984 (Cth)

Cases Cited:

Agricultural & Rural Finance Pty Ltd v Gardiner (2008) 238 CLR 570

AIG Australia Ltd v Kaboko Mining Ltd [2019] FCAFC 96

Androvitsenas v Members First Broker Network [2013] VSCA 212

Australian Broadcasting Commission v Australian Performing Right Association Ltd (1973) 129 CLR 99

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Black Box Control Pty Ltd v Terravision Pty Ltd [2016] WASCA 219

Bond v Chief Executive, Department of Environment and Heritage Protection [2018] 2 Qd R 112; [2017] QCA 180

Brambles Holdings Ltd v Bathurst City Council (2001) 53 NSWLR 153; [2001] NSWCA 61

Cargill Australia Ltd v Viterra Malt Pty Ltd (No 28) [2022] VSC 13

Celtech International Ltd v Dalkia Utility Services plc [2004] EWHC 193 (Ch)

Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337; [1982] HCA 24

Commissioner of Taxation v Douglas (2020) 282 FCR 204; [2020] FCAFC 220

CRO Travel Pty Ltd v Australia Capital Financial Management Pty Ltd [2018] NSWCA 153

Darlington Futures Ltd v Delco Australia Pty Ltd (1986) 161 CLR 500

Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd (2017) 261 CLR 544; [2017] HCA 12

Elders Ltd v EJ Knight Co Pty Ltd [2009] NSWSC 1462

Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7

Fal Oil Co v Sharjah Electricity and Water Authority [2019] DIFC ENF 221

General Reinsurance Australia Ltd v HIH Casualty & General Insurance Ltd (in liq) [2009] NSWCA 22

Gibb v Federal Commissioner of Taxation (1966) 118 CLR 628

Gold Coast City Council v Sunland Group Ltd (2019) 1 QR 304; [2019] QCA 118

HDI Global Specialty SE v Wonkana No 3 Pty Ltd (2020) 104 NSWLR 634; [2020] NSWCA 296

Horsell International Pty Ltd v Divetwo [2013] NSWCA 368

Impact Funding Solutions Ltd v AIG Europe Insurance Ltd [2017] AC 73; [2016] UKSC 57

Kelly v R (2004) 218 CLR 216; [2004] HCA 12

Liberty Mutual Insurance Company Australian Branch (t/as Liberty Specialty Markets) v Icon Co (NSW) Pty Ltd [2021] FCAFC 126; (2021) 154 ACSR 126

Loralia Group LLC v Landen Saudi Co [2018] DIFC ARB 004

McCann v Switzerland Insurance Australia Limited (2000) 203 CLR 579; [2000] HCA 65

MGICA Ltd v United City Merchants (Australia) Limited (1986) 4 ANZ Ins Cas 60-729

Minister for Immigration, Local Government and Ethnic Affairs v Dela Cruz (1992) 34 FCR 348

Mobileciti Pty Ltd v Vodafone Pty Ltd [2009] NSWSC 899

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37

Onley v Catlin Syndicate Ltd (as the underwriting member of Lloyd's Syndicate 2003) (2018) 360 ALR 92; [2018] FCAFC 119

Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451; [2004] HCA 35

Red Hill Iron Ltd v API Management Pty Ltd [2012] WASC 323

San v Rumble (No 2) [2007] NSWCA 259

Segelov v Ernst & Young Services Pty Ltd (2015) 89 NSWLR 431; [2015] NSWCA 156

Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd [2004] 4 All ER 1072; [2004] 1 WLR 1784

Star Entertainment Group Limited v Chubb Insurance Australia Ltd [2022] FCAFC 16

The Luna [2022] 1 Lloyd's Rep 216; [2021] SGHC 84

The Rafaela S [2005] 2 AC 423; [2005] UKHL 11

The Starsin [2003] 1 Lloyd's Rep 571; [2004] 1 AC 715

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Vincent Nominees Pty Ltd v Western Australian Planning Commission [2012] WASC 28; (2012) 187 LEGRA 303

Waters Lane v Sweeney [2007] NSWCA 200

Watson v Scott [2016] 2 Qd R 484; [2015] QCA 267

Whitworth Street Estates v Miller [1970] AC 583

Wilkie v Gordian Runoff Ltd (2005) 221 CLR 522; [2005] HCA 17

YYY Ltd v ZZZ Ltd [2017] DIFC ARB 005

Texts Cited:

Accounting and Auditing Organisation for Islamic Financial Institutions, Sharia Standard No 8 on Murabaha (issued 16 May 2002)

Bernard Eder, et al, *Scrutton on Charterparties and Bills of Lading* (25th ed, 2015, Sweet and Maxwell)

Dicey and Morris on the Conflict of Laws (10th ed, 1980, Stevens & Sons Limited) vol 2

Greg Pynt, *Australian Insurance Law: A First Reference* (4th ed, 2018, LexisNexis)

Martin Davies and Anthony Dickey, *Shipping Law* (4th ed, 2016, Thomson Reuters)

Carole Murray, et al, *Schmitthoff's Export Trade: The Law and Practice of International Trade* (12th ed, 2012, Sweet and Maxwell)

Category: Principal judgment

Parties:

Thera Agri Capital No 2 Pty Ltd (Plaintiff)
BCC Trade Credit Pty Ltd t/as The Bond & Credit Co (Defendant)

Representation:

Counsel:
Mr J Giles SC / Mr J Byrnes (Plaintiff)
Mr R Scruby SC / Mr B Smith (Defendant)

Solicitors:
Corrs Chambers Westgarth (Plaintiff)
Polczynski Robinson (Defendant)

File Number(s): 2020/283415

1. **HER HONOUR:** This case concerns whether the plaintiff insured, Thera Agri Capital No 2 Pty Ltd, is entitled to indemnity under a "Trade Credit Insurance Policy" issued by the defendant insurer, BCC Trade Credit Pty Ltd trading as "The Bond & Credit Co".

2. As explained by the insurer's underwriting guidelines, trade credit insurance is a business insurance product that indemnifies a seller against losses from non-payment of a commercial trade debt. The insurer pays an agreed percentage of an invoice or receivable that remains unpaid because of protracted default, insolvency or bankruptcy. Trade credit insurance provides cover for all contracts entered into or goods and services supplied in the policy period. Trade credit insurers normally establish credit limits and terms of business on the supplier's buyers. Trade credit insurance may also be used in the finance sector: for example, see *General Reinsurance Australia Ltd v HIH Casualty & General Insurance Ltd (in liq)* [2009] NSWCA 22 at [23]-[26] .

3. Here, the policy insured performance of a guarantee given in respect of 'supply chain finance' provided by the insured to United Arab Emirates (UAE) company, Phoenix Global DMCC, and its wholly owned Australian subsidiary, Phoenix Agrifoods Pty Ltd, to fund the shipment of grains and pulses from Australia for sale in the Indian subcontinent and South-East Asia. The facility was guaranteed by British Virgin Islands parent company, Phoenix Commodities Pvt Ltd. The finance was to be Sharia-compliant, using a "Murabahah" facility where, rather than charging interest (or *Riba*, which is prohibited under Islamic law), finance is provided by a "profit-disclosed sale" where the seller discloses its original purchase cost and the profit it will be charging to the buyer.

4. After the finance facility was established, the insured advanced some $7.3 million in four drawdowns. Two months' later, the guarantor went into liquidation after, it would appear, incurring catastrophic losses in 'hedging' commodity contracts. Phoenix Global DMCC followed suit two months later. None of the funds advanced by the insured have been repaid. In particular, the guarantor has not paid.

5. During the course of these proceedings, it became apparent as a result of documents and evidence obtained using the compulsory processes of the Court – but unknown to the insured or the insurer at the time of the advances – that some of the documents provided in support of the drawdown requests were a sham, being contracts to buy commodities from Dubai company, ACME Summit General Trading LLC, and Singapore company, Avon International Pte Ltd, both of which have also since gone into liquidation. In short, the insured was the victim of a fraud practised by its customer, perhaps to 'prop up' their parlous financial position. It would also appear that the Murabaha facility provided by the insured was not, in fact, Sharia-compliant. The insurer has denied liability on these bases.

FACTS

6. The insured relied on the evidence of chief executive officer and chief compliance officer, Mark Allen, and chief investment officer, Razvan Mondoca. Neither were required for cross-examination.

7. The insurer relied on the expert evidence of Amjad Ali Khan, a lawyer practising in Dubai, UAE. Mr Khan provided two reports concerning Sharia principles and Islamic law, and how the contractual arrangements underlying the insurance policy may be viewed by the courts of the Dubai International Financial Centre (*DIFC*). Mr Khan was not required for cross-examination. In addition, the insurer relied on the evidence of Muhammad Sufyan Nagaria, the former managing director of ACME, and Khiaw Ping Kelvin Thio, the liquidator of Avon. Both gentlemen were cross-examined. No issues of credit arose.

Proposed finance

8. Mr Allen and Mr Mondoca own and operate Thera TFS Pty Ltd trading as "Thera Capital Management". Thera is an Australian non-bank structured credit financier specialising in agricultural commodities and products. The insured operates one of three funds managed by Thera; the fund is used to finance Sharia-compliant transactions.

9. In 2019, Phoenix Agrifoods sought approval for funding of $8 million to finance the pre-export operations of grains and pulses from Australia for sale in the Indian subcontinent and South-East Asia. According to an internal report by Mr Mondoca, Phoenix Agrifoods was then financed by Phoenix Global DMCC but "with the tonnage growing and the need for the Australia[n] subsidiary to be financially independent from the Parent for working capital requirements", finance was sought in Australia. Phoenix Agrifoods, Phoenix Global DMCC and parent company, Phoenix Commodities, were part of the Phoenix Group, which operated out of Dubai and was involved in the production, processing, trading and distribution of agricultural products. The Phoenix Group had 22 regional offices in all major origin and destination hubs and trading centres and a presence in South Asia, Far East Asia, Africa, Europe, Australia, North America and South America.

10. Thera proposed to provide 'supply chain finance', where the finance was secured against a trade receivable rather than the underlying product. Mr Mondoca explained that supply chain finance can be structured either as conventional finance or Sharia-compliant finance. It appears to have been initially envisaged that the finance would be structured as conventional finance.

Seeking insurance

11. Thera sought trade credit insurance for the proposed finance. In June 2019, the insured's Singaporean broker asked the insurer to do a credit limit check on the Phoenix Group, noting "Phoenix is large commodities trader and pretty well established. The facility would be for their Australian Subsidiary with a guarantee from their parent." The insurer approved the proposed credit limit of US$5 million, "No issue with the $5m limit at all. *We know the group well.*"

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12. In September 2019, the insured commissioned a Know Your Client (*KYC*) report on the Phoenix Group. In October 2019, Mr Mondoca prepared an Information Memorandum on the proposed transaction, noting that the clients are “established agri-food global player[s] with 2 decades history”. Thera proposed to advance the loan by prepayment of Australian farmers for up to 30 days prior to delivery of goods to a warehouse leased by Phoenix Agrifoods, “The prepayment is done against a Pro-forma Invoice and sometimes accompanied by a Supply & Purchase Contract”. The goods would then be shipped “on various Incoterms and the cargo is being paid against D/P or CAD presentation to Buyers (mainly CIF/CFR and DAB named place at destination)”. Upon delivery “Phoenix AU is provided with a commercial invoice covering the tonnage delivered.” Phoenix Agrifoods would then pay back the loan from Thera. This trade cycle was expected to take 120 days.

13. On 24 November 2019, Mr Mondoca updated the broker on negotiations with the Phoenix Group, noting that the deal would now be financed “from the Sharia vehicle – [the insured]; *no changes in terms of structure, just documentation would be under Islamic finance*/i.e. Murabaha Contract with the Client.” The insurer was so advised and amended the proposed policy wording accordingly; “I’ve had [to] make a couple of small amendments as we cannot have the word ‘loan’ incorporated into the document. The word loan has been changed to ‘funds’.” This amendment was made in three places.

The proposal

14. On 16 December 2019, the broker submitted a revised and final proposal to the insurer, entitled “Application for Trade Credit Insurance Policy (Single Obligor)”. The broker also passed on Mr Mondoca’s instructions: “*Same risk profile and structure*, but we’ll finance [Phoenix now] from our Sharia Investment Vehicle” with the financing mechanism to be a “master murabaha facility”. The proposal included a description of the activities of “the Obligor” (the Phoenix Group) as detailed in Mr Mondoca’s Information Memorandum (extracted at [12]).

15. The proposal form called for a detailed description of “the structure of the payment obligation for which insurance is required”. The insured stated: (emphasis added)

> 1. TAC [Thera Agri Capital] proposed financing will cover End to End trade cycle, from Prepayment to Collection from Buyers, for up to max 120 days tenor.
>
> 2. An over-arching credit limit is put in place and supported by “Master Murabaha Facility Agreement”.
>
> 3. *Customer selects pulses and grain to be purchased from a third-party Vendor and arrange for the invoice and “Offer and Acceptance” to TAC to settle the purchase.*
>
> 4. *TAC agrees to purchase the product subject to “Offer and Acceptance” request and has received duly executed set of Murabaha contracts by the Customer*.
>
> 5. *At this point TAC will disburse the loan proceeds to Customer for settlement.* The Customer will settle the payment to Vendor as Agent for TAC and undisclosed to the Vendor.

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6. At maturity as indicated in the "Offer and Acceptance" Customer pays for the product financed and the loan cycle is liquidated.

16. The maximum exposure that the insured would have to the payment obligation was stated to be $8 million, with the tenor and repayment terms of the obligation being 120 days. The proposal form called for a description of "the primary purpose of the obligation that is being created", to which the insured responded: "*Working capital financing*". As to the primary source of repayment of the obligation, the proposal described a "Loan Repayment waterfall":

   1) First from the sale proceeds of product financed collected from the pre-export operations of pulses and grains financed by TAC. …

   2) Second from the general cash-flow of the Jointly Borrowers, as the financing is with full recourse to Customers.

   3) Third – first demand guarantee from the Guarantor / parent company.

   4) Fourth – claim lodged to Underwriter under Non payment Insurance policy covering payment risk of the Guarantor.

17. The proposal stated that three documents would be executed between the insured and its customers in respect of the obligation, being a Master Murabaha Facility, a General Security Agreement and a guarantee from Phoenix Commodities. On 13 January 2020, the insured's broker provided the insurer with a draft of these documents, together with a draft Purchase Agency Agreement; the insurer was asked to review the documents. On 20 January 2020, the insurer issued an invoice for the premium. On 11 February 2020, the Trade Credit Insurance Policy was issued. I will return to the terms of the policy at [163].

18. On 13 February 2020, the insured and the Phoenix Group executed the Master Murabaha Agreement, Purchase Agency Agreement, Guarantee and Indemnity and General Security Deed. On 16 February 2020, Mr Mondoca provided the broker with the executed documents. The broker sought confirmation that the executed documents were materially the same as the drafts earlier provided. Mr Mondoca confirmed that this was the case. The broker provided the insurer with marked-up copies of the documents so that changes from the drafts previously submitted could be identified. The insurer replied, "Looks to be fine to me." On 18 February 2020, the insurance premium was paid.

Master Murabaha Agreement

19. The finance documents were complex and imperfect. As the insurer placed weight on the precise workings of these documents, it is necessary to understand their provisions.

20. The insured (defined as the Financier) entered into a Master Murabaha Agreement with Phoenix Agrifoods and Phoenix Global DMCC (each a Company). The Financier agreed to make available to the Companies an $8 million murabaha facility (the Murabaha Facility): clause 2.1.

21. As to how a murabaha facility may be described more broadly, Mr Khan explained that, through the application of Sharia principles, the Islamic finance industry has developed a number of Sharia-compliant financial contracts, including Murabaha arrangements, which Mr Khan described as follows:

> A *Murabahah* arrangement involves an asset purchase transaction, in which a party (usually an Islamic financial institution) (**Party A**) purchases an asset from a third party at the request of its counterparty (usually the customer of the Islamic financial institution) (the **Counterparty**). Once Party A acquires title to the asset it enters into a Murabahah contract to resell the asset to the Counterparty. The sale price payable by the Counterparty equals the original purchase price paid by Party A plus an agreed return (i. e., cost-plus), and is payable on a deferred basis. A Murabahah enables the Counterparty to acquire an identified asset, but pay the purchase price for it over time.

22. As to how this Murabaha Facility could be utilised, clause 2 continued: (emphasis added)

> **Murabaha Facility utilisation**
>
> 2.2 Pursuant to the Purchase Agency Agreement, the Financier has appointed each Purchase Agent as its agent to purchase Commodities from time to time.
>
> 2.3 The Financier (through a Purchase Agent) will purchase Commodities at Cost Price from the Commodity Seller and then *immediately sell* those under a Murabaha Contract to the relevant Company at Cost Price plus a profit margin equal to the Profit Amount, payable on the Payment Dates *subject to, and in accordance with, the terms and conditions of the Finance Documents and the transactions contemplated thereunder.*

23. Purchase Agent meant each Company in its capacity as the Financier's purchasing agent in connection with the purchase of Commodities from the Commodity Seller. Finance Documents meant the Master Murabaha Agreement, the Guarantee and Indemnity, the Purchase Agency Agreement, General Security Deed *and the documents evidencing each Murabaha Contract*: clause 1.1. The suggestion that the Financier would "purchase Commodities … and then immediately sell those" to the Company contemplated a quick sequence of transactions, perhaps by an exchange of documents evidencing each Murabaha Contract.

24. To drawdown on the Murabaha Facility, clause 4.1 provided:

> A Company may utilise the Murabaha Facility by delivery to the Financier of a duly completed Murabaha Request at least five (5) Business Days before the proposed Value Date …

Value Date meant the date on which a Murabaha Contract was to be entered into.

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25. Schedule 2 to the Master Murabaha Agreement contained a Form of Murabaha Request. Using the first Murabaha Request as an example, the request was issued by the Company to the Financier on 20 February 2020 and stated: (emphasis added)

> We wish to enter into a Murabaha Contract and hereby request that you purchase the Commodities described below *on the Value Date* on the terms set out herein and the Agreement:
>
> (a) Commodities: Australian Desi Chickpeas
>
> (b) Value Date: [24]-Feb-2020
>
> (c) Cost Price: USD 726,782.10
>
> (d) Murabaha Contract Term: CAD [cash against documents]
>
> (e) Commodity Seller: Avon International Pte Ltd
>
> We confirm that each of the representations in clause 13 (*Representations*) of the Agreement is true and correct on the date of this Murabaha Request and will be correct on the proposed Value Date.
>
> We hereby certify and confirm that each condition specified in 4.3 is satisfied as at the date of this Murabaha Request.
>
> We hereby promise to purchase the Commodities described above from you for the Sale Price in accordance with the Agreement *after the Commodities are identified as being in your ownership*. We acknowledge that these Commodities will be purchased by you in reliance upon such promise and that you may incur losses, damages and other liabilities if we fail to purchase such Commodities from you in accordance with the Agreement.
>
> This Murabaha Request is *irrevocable*.
>
> This Murabaha Request, and all non-contractual obligations arising out of or in connection with it, are governed by, and shall be construed in accordance with New South Wales law.

26. The first thing to note is that the Financier was requested to purchase the Commodities (through its agent, the Company) *on the same day* as entry into a Murabaha Contract, being the Value Date. This is, again, suggestive of the purchase and on-sale of the Commodities in quick succession and perhaps by exchange of documents.

27. Second, by the Murabaha Request, the Company confirmed each of the representations in clause 13 of the Master Murabaha Agreement, including on the date of each Murabaha Request and each Payment Date (clause 13.3). Payment Date meant the Value Date and the Deferred Payment Date, being, in short, the date of entry into a Murabaha Contract and the date on which the monies advanced to the Company were to be repaid. On each of these dates, the Company represented and warranted, *inter alia*: (emphasis added)

(d) Each of its obligations under the Finance Documents are … *valid and binding obligations enforceable against it* in accordance with their terms.

…

(f) *It is not, and will not, by entering into and performing the Finance Documents, and the transactions contemplated by them, breach the terms of … any law applicable to it.*

…

(j) No Event of Default is continuing or might reasonably be expected to result from the making of any Murabaha Contract or the entry into, the performance of, or any transaction contemplated by, any Finance Document.

…

(l) Any factual information provided by a Company to the Financier in connection with the Finance Documents and the transactions they contemplate was true and accurate in all material respects and not misleading as at the date it was provided or as at the date (if any) at which it is stated.

(m) It has disclosed in writing to the Financier all matters in connection with the Finance Documents which may affect the nature and extent of the risk undertaken by the Financier in connection with entering into the Finance Documents or doing anything else under the Finance Documents.

28. Events of Default were specified in clause 15. As later became relevant, Events of Default included the winding up of the Parent: clause 15.11. In addition, Events of Default included: (emphasis added)

Misrepresentation

15.3 Any representation, warranty or statement made … by the Company … in the Finance Documents or any other document delivered by or on behalf of a Company … under or in connection with any Finance Document is or proves to have been incorrect or misleading in any material respect when made …

Unlawfulness

15.15 *It is or becomes unlawful for a Company … to perform any of its obligations under the Finance Document. …*

Fraud

15.18 The Financier reasonably believes that a Company or the Parent or any of its directors, officers or employees have acted fraudulently in connection with any Finance Document or any other agreement between a Company or the Parent and the Financier. …

Vitiation of Finance Documents

> 15.21 A provision of a Finance Document is or becomes or is claimed by a party other than the Financier to be *wholly or partly invalid, void, voidable or unenforceable*.

29. On the occurrence of an Event of Default, the Financier was entitled to cancel the Murabaha Facility and accelerate repayment of each Murabaha Contract under clause 15.22, to which I will return at [210]. Thus, to the extent that the Company had engaged in misrepresentation or fraud, or it was or became unlawful for the Company to perform any of its obligations under a Finance Document, or a claim was made by a party other than the Financier that a provision of a Finance Document was unenforceable (say, an insurer), the Financier was entitled to call for a payment of the funds advanced immediately.

30. Third, by the Murabaha Request, Phoenix Agrifoods also confirmed each condition in clause 4.3 of the Master Murabaha Agreement, including:

> ...
>
> (d) the purchase of the Commodities is on Approved Purchase Terms.
>
> (e) no Default has occurred or is continuing or would result from the entry into of a Murabaha Contract; and
>
> (f) the representatives and warranties of the Companies under the Finance Documents are true in all material respects and not misleading on the proposed Value Date by reference to the facts and circumstances then existing

31. Default meant Events of Default. As to the Approved Purchase Terms, clause 1.1 provided:

> **Approved Purchase Terms** means, in respect of any purchase of Commodities by a Company as Purchase Agent for and on behalf of the Financier, the purchase is from a Commodity Seller ... on the following terms:
>
> (a) delivery of the Commodity is to be within 30 days of the relevant purchase date;
>
> (b) cash on delivery; or
>
> (c) other secured purchase terms as approved by the Financier.

It will be recalled that the first Murabaha Request (extracted at [25]) stated that the terms on which the commodities were to be purchased was cash against documents being, for practical purposes, cash on delivery.

32. In short, by a Murabaha Request the Company represented and warranted – at the date of the Murabaha Request, the date of entry into the Murabaha Contract and the date of repayment – that the obligations under the Finance Documents were valid and binding obligations enforceable against the Company and that the Company would not, by performing these obligations, breach the terms of any law applicable to the Company which, by the very nature of the Master Murabaha Agreement, likely included Islamic law. When making a Murabaha Request, the Company represented that the transaction was Sharia-compliant and, if that

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representation proved untrue, then the Financier was entitled to treat this as an Event of Default and call for a payment of the Murabaha Facility immediately. It follows that, even if the resulting Murabaha Contract was unenforceable as contrary to Sharia principles, the Financier nonetheless had a claim against the Company for breach of warranty, where the Financier's remedy was to require repayment of the Murabaha Facility in full on demand. Further, the Company represented that proposed transaction was legitimate and the documents supporting that transaction could be relied upon as true and accurate. Unsurprisingly, the obligation to repay the funds advanced did not fall away by reason of the misrepresentation, fraud or illegal conduct on the part of the Phoenix Group.

33. Having submitted a Murabaha Request, clause 5 provided:

> **5 Purchase and Sale of Commodities**
>
> **Purchase of Commodities by the Financier**
>
> 5.1 In reliance on each duly completed Murabaha Request … the Financier shall (acting through the Purchase Agent) (i) on the date falling three Business Days after due delivery of the relevant Murabaha Request purchase Commodities which are the subject of such Murabaha Request from the Commodity Seller; and (ii) obtain from the Commodity Seller all applicable title documents clearly identifying then Commodities purchased on behalf of the Financier.
>
> **Completion of Offer Letter**
>
> 5.2 Having acquired title to the Commodities, the Financier shall on the date falling three Business Days after due delivery of the relevant Murabaha Request, deliver an Offer Letter to the relevant Company.
>
> 5.3 **Acceptance Notice**
>
> (a) Upon receipt of the Offer Letter, if accepted, the relevant Company must deliver to the Financier an Acceptance Notice …
>
> (b) The relevant Company acknowledges that the Financier will be purchasing Commodities pursuant to a Murabaha Request in reliance upon the Company's promise set out therein to purchase such Commodities for the applicable Sale Price from the Financier after it has purchased the same from the relevant Commodity Seller. The relevant Company further acknowledges that the Financier may incur losses, damages and other liabilities if the Company fails to purchase and Commodities from the Financier which have been purchased by the Financier from the Commodity Seller. …

34. Again, purchase of the Commodities was to take place on the same day as delivery of the Offer Letter and the Acceptance Notice (and entry into the Murabaha Contract). Schedule 3 contained a form of Offer Letter and Acceptance. Using the details in the first Offer Letter issued, the insured wrote to Phoenix Global DMCC:

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We confirm to you that we have purchased the Commodities specified in the Murabaha Request for the amount of AU$1,092,905.41 (being the equivalent of US$726,782.10) from the Commodity Seller.

This is an Offer Letter.

We hereby offer to sell you the following Commodities on the following terms:

(a) Value Date: 24 February, 2020

(b) Quantity, type and location of Commodities: 1,286.34 Metric Tonnes, Australian Desi Chickpeas, Goods in transit per attached Bill of lading

(c) Murabaha Contract Term: 23 June 2020

(d) Cost Price (per unit Commodity): AU$ 849.624 per MT

(e) Cost Price: AU$1,092,905.41

(f) Profit Amount: AU$ 26,229.73

(g) Value Date Sale Price Amount: AU$ 109,290.54

(h) Deferred Sale Price: AU$ 1,009,844.60

(i) Deferred Payment Date: 23 June, 2020 …

35. The Acceptance Notice simply stated, "We accept the above Offer Letter". Having issued an Offer Letter and received an Acceptance Notice, clause 5 continued:

5.4 Upon delivery of an Acceptance Notice by the relevant Company to the Financier pursuant to clause 5.3(a) above:

(a) the Financier shall sell the Commodities to such Company:

(b) such Company shall purchase the Commodities from the Financier; and

(c) a Murabaha Contract shall be made between the Financier and such Company upon the terms of that Offer Letter and incorporating all of the terms and conditions set out in this Agreement.

5.5 Title to the Commodities shall immediately pass to the relevant Company, together with all related rights and obligations, upon the delivery of the Acceptance Notice by the Company in accordance with clause 5.3. The relevant Company shall obtain ownership and such title to the Commodities as the Financier (acting through the Purchase Agent) has received from the Commodity Seller.

36. That is, the Murabaha Contract came into existence on delivery of the Acceptance Notice, being on the Value Date. Clause 5 continued: (emphasis added)

Acceptance of Commodities

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5.10 The relevant Company hereby acknowledges that upon delivery or transfer of the Commodities to the Company, the Company shall be deemed and considered to have accepted such Commodities unconditionally and without reservations and *shall have no further remedy against the Financier in respect of* their quality, condition, quantity, description, *title* or otherwise.

Waiver of claims

5.11 Without prejudice to clause 5.10 (*Acceptance of Commodities*), each *Company hereby waives any claims which it may have against the Financier in respect of any loss or damage* (**Loss**) which a Company may suffer by reason of, or arising out of or in connection with the Financier having placed an order for purchase of Commodities with a Commodity Seller acting through the Purchase Agent, having taken title or *having failed to take title to the Commodities* or having sold the Commodities to the relevant Company under this Agreement or any Murabaha Contract.

37. This makes sense where the Company identified the Commodities in respect of which finance was sought. Whilst the Financier proceeded to purchase the Commodities, using the Company as its agent, it was not envisaged that the Financier would have any particular knowledge about the Commodities beyond the information provided by the Company: see also [53]. The Master Murabaha Agreement made plain that, to the extent that there was any defect in title to the Commodities, then the Company had no claim against the Financier. Clause 5 continued: (emphasis added)

Cancellation of Murabaha Contracts

5.12 A Murabaha Contract shall be cancelled *without any liability whatsoever on the part of the Financier* if for any reason title to the relevant Commodities is not passed to the Financier by the Commodity Seller on the applicable Value Date. …

38. Clause 5.12 is a continuation of the theme in clause 5.10 and 5.11: not only does the Company have no claim against the Financier if there is any defect in the title of the Commodities, the Financier has no liability whatsoever should the Murabaha Contract be cancelled on account of that defect. The clause pre-supposes that a Murabaha Contract had come into existence. As I read it, clause 5.12 prescribed the consequences which would follow in the event that the Financier proceeded to cancel the Murabaha Contract on becoming aware of a defect in title. Clause 5.12 continues to emphasise, as did clause 5.10 and 5.11 before it, that the Financier had no liability in this scenario. Clause 5.12 does not mean, however, that the Company is not obliged to repay the funds advanced by the Financier to purchase the Commodities, being either an obligation under the Murabaha Contract at the time of cancellation or by reason of the Company's obligations under the Master Murabaha Agreement more broadly, in particular, under clause 7.9 (see [40]) and the indemnities given in clause 11.5 (see [42]). Where it was anticipated that the Company, and not the Financier, would have knowledge about the Commodities, it would be an absurd result that, if the Financier advanced funds at the Company's request to a Commodity Seller identified by the Company and title to the Commodities failed to pass, then the Company could keep the money.

39. Clause 6 of the Master Murabaha Agreement concerned the Company's obligation to repay the funds advanced, in the form of the Deferred Sale Price. The defined term Deferred Sale Price is of some significance as the insurer's primary argument turns on whether there was, in fact, any obligation to pay the Deferred Sale Price in this case. I will return to this at [148].

40. Clause 7 concerned repayment, termination and cancellation, in particular: (emphasis added)

> **Illegality**
>
> 7.1 If, in any applicable jurisdiction, it becomes unlawful (or impossible as a result of a change in law or regulation) for the Financier to perform any of its obligations as contemplated by this Agreement or in any Murabaha Contract:
>
> > (a) upon the Financier giving not less than 10 Business Days written notice to the Companies, the Facility Amount will be immediately cancelled; and
> >
> > (b) each Company shall pay the outstanding Deferred Sale Price on the Deferred Payment Date for each Murabaha Contract on the date specified by the Financier in the notice delivered to the relevant Company 10 Business Days after giving such notice.
>
> ...
>
> > **Payment obligations unconditional**
>
> 7.9 *The payment* and other *obligations of each Company* under or in respect of a Murabaha Contract and this Agreement *shall not be affected, mitigated or released in any way as a result of any defect in title to the relevant Commodities*, any deficiency in the Commodities, any loss or damage to the Commodities, any failure by the Commodity Seller to comply with any of its undertakings or obligations *or any other reason whatsoever*.

41. That is, if it became unlawful for the Financier to perform the Master Murabaha Agreement or any Murabaha Contract, the Financier was entitled to cancel the Murabaha Facility and be repaid in short order. Clause 7.9 makes plain that, if there was any problem with the Commodities (including "*any defect in title to the ... Commodities ... or any other reason whatsoever*"), the Company's obligation to repay the funds advanced remained.

42. Clause 11 contained wide indemnities by which the Company agreed to indemnify the Financier against any cost, loss or liability incurred as a result of *inter alia*: any Event of Default; misleading or deceptive information produced by the Company in connection with the Finance Documents or the transactions they contemplated; the Financier acting on a request which it reasonably believed to be genuine, correct and appropriately authorised; or, losses incurred in relation to the purchase and sale of the Commodities: clause 11.3(a) and (b); 11.4(b) and 11.5.

43. The Company also gave an undertaking to comply in all respect with all laws to which it may be subject, if failure to so comply had or was reasonably likely to have a Material Adverse Effect on the ability of the Company to perform its obligations under the Finance Documents or the

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validity or enforceability of the Finance Documents or the rights and remedies of the Financier under any of the Finance Documents: clause 14.3; clause 1.1 (definition of Material Adverse Effect).

44. Further, clause 21 provided:

> **Partial invalidity**
>
> If, at any time, any provision of the Finance Documents is or becomes illegal, invalid or unenforceable in any respect under any law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions nor the legality, validity or enforceability of such provision under the law of any other jurisdiction will in any way be affected or impaired.

That is, to the extent that Sharia principles had the result that any Murabaha Contract was unenforceable, say, in the UAE, that did not prevent the Murabaha Contract being enforceable in another jurisdiction, say, in New South Wales.

45. As to governing law and jurisdiction, clause 25 provided:

> **25 Governing law and jurisdiction**
>
> 25.1 This Agreement document is governed by the laws in force in New South Wales.
>
> 25.2 Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of the Dubai International Financial Centre and courts of appeal from them.

46. Consistently with this, the standard form Murabaha Request stated that the request "and all non-contractual obligations arising out of or in connection with it" were governed by and to be construed in accordance with New South Wales law. Presumably, the reference to "non-contractual obligations" encompassed obligations arising from Islamic law. Likewise, the standard form Offer Letter Acceptance stated that the offer was subject to clause 25 of the Master Murabaha Agreement.

47. Thus, the Master Murabaha Agreement provided (repeatedly) for the eventuality that any particular transaction was considered void according to Sharia principles and imposed separate contractual obligations on the Company to repay the funds advanced notwithstanding.

Purchase Agency Agreement

48. On 13 February 2020, Phoenix Agrifoods and Phoenix Global DMCC (each a Purchase Agent) and the insured (as Financier) executed a Purchase Agency Agreement, by which the Financier appointed each Purchase Agent as its agent to purchase on the Financier's behalf Approved Commodities as set out in a Purchase Instruction: clause 2.1. Approved Commodities were the Commodities (as defined in the Master Murabaha Agreement) referred to in a Purchase Instruction, provided that such commodities were Sharia-compliant commodities: clause 1.1.

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49. A Purchase Instruction was an instruction substantially in the form set out in Schedule 1, being an instruction issued by the insured to the Purchase Agent as follows (inserting the details from the first Purchase Instruction):

> 2. We hereby instruct you as our agent, pursuant to the terms of the Agency Agreement, to purchase on our behalf from the applicable Commodity Seller the following Approved Commodities and on the following basis:
>
> > (a) Description: Australian Desi Chickpeas
> >
> > (b) Quantity: 1,286.34 Metric Tonnes
> >
> > (c) Cost Price: AU$1,092,905.41 being the equivalent of US$726,782.10
> >
> > (d) Value Date: 22 February, 2020
>
> 3. To give effect to this Purchase Instruction, we shall transfer to your account:
>
> > **Account Name:** Phoenix Agrifoods Pty Ltd (acting as agent [o]n behalf of Phoenix Global DMCC)
> >
> > … by no later than then 11.00am on the proposed Value Date specified above the Cost Price as set out above.
>
> 4. Please send us your Purchase Confirmation as soon as practicable upon purchase of the Commodities from the Commodity Seller.
>
> 5. The provisions of clause 12 of the Agency Agreement apply to this Purchase Instruction as if set out in full.

50. It is likely – based on the layout of the prescribed forms under the Master Murabaha Agreement – that the reference to clause 12 (Notices) of the Agency Agreement was an error and was intended to be a reference to clause 13 (Law and jurisdiction), being in same terms as clause 25 of the Master Murabaha Agreement and adopting the laws of New South Wales and submitting to the non-exclusive jurisdiction of the courts of the DIFC.

51. As to the funds to enable the Purchase Agent to acquire the Commodities, and the acquisition of the Commodities, clause 2 continued:

> 2.2 Transfer of funds
>
> The Financier will transfer … not later than 11.00am on the relevant Value Date (as specified in each Purchase Instruction), such funds as may be necessary for the Purchase Agent to complete the agreed purchase on behalf of the Financier and to enable the Purchase Agent to effect payment of the purchase price due to the Commodity Seller on the payment date (as communicated by the Commodity Seller) …
>
> 2.3 Confirmation

> As soon as reasonably practicable after the relevant Purchase Agent has bought Commodities pursuant to a Purchase Instruction, the Purchase Agent shall confirm such purchase by sending to the Financier a Purchase Confirmation …

52. Again, it was envisaged that the purchase of the Commodities would take place on the same day as entry into the Murabaha Contract, being the Value Date. A Purchase Confirmation was a confirmation substantially in the form set out in Schedule 2, being a confirmation from the Purchase Agent to the Financier as follows: (inserting the details from the first Purchase Confirmation)

> 2. We confirm that we have purchased the Approved Commodities from the applicable Commodity Seller on your behalf in accordance with the terms of the above Purchase Instruction and as follows:
>
> (a) Description: Australian Desi Chickpeas
>
> (b) Quantity: 1,286.34 Metric Tonnes
>
> (c) Location: Goods in transit per attached Bill of lading
>
> (d) Cost Price: AU$1,092,905.41 being the equivalent of US$726,782.10
>
> (e) Value Date: 24 February, 2020

Again, the Purchase Confirmation proceeded to apply the provisions of clause 12 of the Purchase Agency Agreement but, likely, was an error and intended to refer to clause 13.

53. The Purchase Agent was also obliged to provide the Financier with information or details requested in relation to the Commodities and the purchase of the Commodities, including the type, quantity and location of the Commodities: clause 2.6. Finally, the Purchase Agency Agreement contained a "Partial Invalidity" clause in the same terms as clause 21 of the Master Murabaha Agreement (clause 6) and a "Law and Jurisdiction" clause in the same terms as clause 21 of the Master Murabaha Agreement (clause 13).

Guarantee and indemnity

54. The recitals to the Guarantee and Indemnity noted that the insured had agreed to provide "commodity financing and/or financial advances … under or in connection with the Transaction Documents (the "Arrangements")" to Phoenix Agrifoods and Phoenix Global DMCC, each a Counterparty. "Transaction Documents" meant the Master Murabaha Agreement and each Finance Document as defined in that agreement: clause 30(a). The Operative Part of the Guarantee and Indemnity provided: (emphasis added)

> 1 Each Guarantor hereby guarantees the due and punctual payment by the Counterparty of all moneys from time to time due and payable by the Counterparty to [the insured] ("Guaranteed Moneys") and the due and punctual performance of all obligations owed or

which may become owing by the Counterparty to [the insured] under or in connection with the Transaction Documents ("Guaranteed Obligations").

2 Each Guarantor hereby undertakes that if any Event of Default occurs and whilst it is continuing, it will forthwith on first written demand by [the insured] pay to [the insured] the amount (or from time to time the amounts) of the Guaranteed Moneys.

…

5 If the obligation of the Counterparty to pay the Guaranteed Moneys to [the insured] is or becomes void or unenforceable for any reason, each Guarantor as a separate undertaking unconditionally and irrevocably indemnifies [the insured] against any loss, damages, costs or expenses incurred by [the insured] in respect of the failure by the Counterparty to pay to [the insured] the Guaranteed Moneys.

…

10 This Guarantee is a continuing security and accordingly is *irrevocable* and shall remain in full force and effect until all the Guaranteed Moneys have been paid to [the insured] and there are no outstanding Guaranteed Obligations. …

55. "Event of Default" had the same meaning as in the Master Murabaha Agreement: clause 30(b). Clause 5 imposed an obligation on the guarantor to indemnify the insured in the event that the Company's obligation to repay the funds advanced under the Master Murabaha Agreement became "void or unenforceable for any reason".

56. Overall, the finance documents provided that, if any particular transaction was considered void according to Sharia principles, the Phoenix Group was nonetheless obliged to repay the funds advanced.

Shipments begin

57. Whilst negotiations were underway between the insured and its customers in respect of the finance facility, and between the insured and insurer in respect of the policy, the shipment of commodities by the Phoenix Group from Australia, which were later financed under the facility, was already underway.

58. On 1 January 2020, 20 containers of red lentils were loaded in Adelaide on *APL PHOENIX* and departed for Colombo, Sri Lanka for transhipment on the *X-PRESS MEGHNA* for delivery onto Kolkata, India. Mediterranean Shipping Company SA issued a bill of lading ending 5049, noting the shipper as Phoenix Global DMCC. (These commodities became part of the sixth Murabaha Request). On 26 January 2020, *X-PRESS MEGHNA* arrived in India and the containers were unloaded.

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59. On 15 January 2020, ten containers of Australian faba beans were loaded in Melbourne onto *OOCL TEXAS* and departed for Egypt via Singapore and Malta. Cosco Shipping Lines Co Ltd issued a bill of lading ending 9350, noting the shipper as Phoenix Global DMCC. (These commodities formed part of the second Murabaha Request.)

60. On 26 January 2020, 15 containers of red lentils were loaded in Adelaide onto *ER TOKYO*, bound for Turkey. The carrier, CMA CGM SA, issued a bill of lading ending 7421, noting the shipper as Phoenix Global DMCC. (This formed part of the sixth Murabaha Request).

61. On 26 and 27 January 2020, 15 containers with Australian desi chickpeas were loaded in Brisbane onto *MSC BANU* bound for Karachi, Pakistan via Singapore and Abu Dhabi. Three bills of lading were issued by the Mediterranean Shipping Company SA ending 4869, 7722 and 7730. The shipper in each case was Phoenix Global DMCC. (The cargo the subject of these three bills of lading comprised the first Murabaha Request.)

62. Also on 26 and 27 January 2020, 30 containers of Australian faba beans were loaded in Melbourne onto *COSCO ANTWERP* bound for Egypt via Singapore and Malta. Cosco Shipping Lines Co Ltd issued four bills of lading ending 9150, 9157, 9158 and 9159, with Phoenix Global DMCC noted as the shipper. (This shipment comprised the second Murabaha Request.)

63. On 30 January 2020, Hamburg Sud issued a bill of lading ending 0192X to shipper Phoenix Global DMCC for five containers of red lentils loaded in Adelaide on the *CMA CGM ROSSINI* bound for Turkey via Singapore and Beirut. (These commodities formed part of the sixth Murabaha Request).

64. Also on 30 January 2020, carrier ANL issued a bill of lading ending 2915 for ten containers of Australian nugget lentils loaded in Adelaide onto the *CMA CGM ROSSINI* bound for the UAE. The first page of the bill of lading is not in evidence and thus the shipper (and consignee, if any) is not known. (These commodities became the ninth Murabaha Request.)

65. Also on 30 January 2020, two containers of Australia faba beans were loaded in Adelaide onto *OO CL PANAMA* bound for Egypt via Singapore and Malta. Cosco Shipping Lines Co Ltd issued a bill of lading ending 0340, noting the shipper as Phoenix Global DMCC.

66. On 2 February 2020, 38 containers of Australian desi chickpeas were loaded in Brisbane onto *GH ZONDA* bound for Karachi, Pakistan via Singapore and Abu Dhabi. Mediterranean Shipping Company SA issued bills of lading ending 4893, 5577 and 6435, noting Phoenix Global DMCC as the shipper. (These commodities formed part of the first Murabaha Request).

67. On 6 February 2020, Hapag-Lloyd issued a bill of lading ending 9480 in respect of 20 containers of Australian noodle wheat shipped by Phoenix Global DMCC from Fremantle, Western Australia on *AL HILAL* bound for Vietnam. (This became part of the seventh Murabaha Request).

68. On 6 February 2020, 25 containers of Australian canola were loaded in Melbourne onto *NORTHER N PRECISION*, bound for Penang, Malaysia. T.S. Lines issued a bill of lading ending 1951, noting the shipper as Phoenix Global Australia Pty Ltd on behalf of Phoenix Global DMCC. (This became part of the eighth Murabaha Request.)

69. On 7 February 2020, 20 containers of Australian desi chickpeas were loaded in Brisbane onto *MAE RSK STRALSUND* bound for Chittagong, Bangladesh. Ocean Network Express issued bill of lading ending 0440, noting the shipper as Phoenix Global DMCC to the order of Butch-Bangla Bank Limited. (This became part of the third Murabaha Request.)

70. On 10 February 2020, five containers of Australian desi chickpeas were loaded in Brisbane on *SPH ENE* bound for Karachi, Pakistan via Singapore and Abu Dhabi. Mediterranean Shipping Co SA issued bill of lading ending 5023, noting the shipper as Phoenix Global DMCC. (These commodities formed part of the third Murabaha Request.)

71. On 10 February 2020, 20 containers of Australian hard wheat were loaded in Melbourne on *BEA SCHULTE* bound for Port Kelang, Malaysia. Pacific International Lines issued a bill of lading ending 0800, noting the shipper as Phoenix Global Australia Pty Ltd on behalf of Phoenix Global DMCC. (These commodities formed part of the fifth Murabaha Request.) On 24 February 2020, the shipment arrived at its destination in Malaysia.

72. Mr Allen said that, before obtaining the policy or entering into the finance documents, he was not aware of the contracts which Phoenix Global DMCC had entered into in relation to commodity transactions that came to be financed under the Master Murabaha Agreement. Likewise, Mr Mondoca first became aware of these commodity transactions after entering into the Master Murabaha Agreement in the course of receiving information in the context of Murabaha Requests.

73. The shipments continued after execution of the Master Murabaha Agreement. On 14 February 2020, 33 containers of Australian faba beans were loaded in Adelaide on *CONTI MAKAUL* for shipment to Damietta, Egypt. CMA CGM SA issued four bills of lading ending 871A, 871B, 872A and 872C, noting Phoenix Global DMCC as the shipper. (This became part of the fourth Murabaha Request.)

74. On 15 February 2020, 20 containers of Australian hard wheat were loaded in Melbourne onto *KOT A LATIF* for delivery to Penang, Malaysia. Orient Overseas Container Line issued a bill of lading ending 6730, noting Phoenix Global Australia Pty Ltd as the shipper on behalf of Phoenix Global DMCC. (This became part of the fifth Murabaha Request.)

75. On 16 February 2020, 60 containers of Australian desi chickpeas were loaded in Brisbane on *HAM BURG BAY* for shipment to Chittogram, Bangladesh. Ocean Network Express issued six bills of lading ending 2900, 4600, 7500, 7501, 7502 and 7503, noting Phoenix Global DMCC as the shipper. (This became part of the third Murabaha Request.) One of these bills was endorsed to the order of Eastern Bank Limited, and another to the order of Standard Chartered Bank.

76. On 19 February 2020, 20 containers of Australian desi chickpeas were loaded in Brisbane on to *NA VIOS UNITE* bound for Chittagong, Bangladesh. Ocean Network Express issued a bill of lading ending 7700, noting Phoenix Global DMCC as the shipper and to the order of NRB Commercial Bank Limited. (These commodities formed part of the last Murabaha Request.)

Bills of lading

77. The bills of lading issued by the various shipping lines were substantially similar, in particular:

    1. Phoenix Global DMCC was the shipper (in a few cases, Phoenix Global Australia Pty Ltd was recorded as the shipper on behalf of Phoenix Global DMCC).

    2. Most recorded the consignee as “To Order”, with some exceptions where the bill of lading was endorsed to the order of a bank.

    3. All recorded details in the “Notify Party” part of the bill. The parties to be notified appear to have been mills and processing plants, import and export agents or commodities traders.

78. As observed in *CRO Travel Pty Ltd v Australia Capital Financial Management Pty Ltd* [2018] NSWCA 153, a bill of lading made out “to order” is “negotiable”; the title and rights in respect of the goods covered by the bill are transferrable simply by the physical transfer of the bill endorsed in favour of the new holder. Transfer of the bill by endorsement and delivery transfers the symbolic possession of the goods and the carrier is entitled to deliver the goods to the party to whom the bill of lading has been transferred: at [25]-[28] (per Ward JA) citing Bernard Eder, et al, *Scrutton on Charterparties and Bills of Lading* (25th ed, 2015, Sweet and Maxwell); see also *The Rafaela S* [2005] 2 AC 423; [2005] UKHL 11 at [38] . As the Singapore Court of Appeal recently observed in *The Luna* [2 022] 1 Lloyd’s Rep 216; [2021] SGHC 84 at [29] :

    > the modern bill of lading serves three functions: it operates as: (a) a receipt by the carrier acknowledging the shipment of goods on a particular vessel for carriage to a particular destination; (b) a memorandum of the terms of the contract of carriage; and (c) a document of title to the goods.

79. The learned authors of *Schmitthoff’s Export Trade: The Law and Practice of International Trade* (12th ed, 2012, Sweet and Maxwell) explain, “Negotiable bills are normally used in the commodity trade, such as trade in grain or oil, where bills of lading relating to goods in transit are purchased and sold in string contracts; under which the intermediaries do not intend to take delivery and

only the last purchaser in the string will take physical delivery of the goods from the ship on its arrival": at [15-026]. (The learned authors also explain that a string contract is a series of contracts of sale under which the same goods or bills of lading relating to them are sold by A to B, by B to C, and so forth, possible through the whole alphabet).

80. The significance of completion of the "Notify Party" part of the bill is explained by Martin Davies and Anthony Dickey, *Shipping Law* (4th ed, 2016, Thomson Reuters) at [12.760]:

> To be negotiable, and therefore capable of transfer by indorsement, a bill of lading must be made out "To Order". These words signify that the carrier must deliver the goods to the shipper's order – that is, to the person to whom the shipper has indorsed the bill of lading. If, as is often the case, the shipper knows the identity of the intended receiver, that person's name and address is usually put in the box marked "Notify Party", an appellation that has no legal significance whatever.

81. As such, the bills of lading were negotiable and the shipper (Phoenix Global DMCC) could determine who was entitled to take delivery of the commodities by indorsing the bill of lading in favour of a named consignee, to whom it transferred the bill. The fact that Phoenix Global DMCC was noted as the shipper on each bill of lading does not necessarily mean, however, that Phoenix Global DMCC had title to the commodities. While a bill of lading is a document of title, it depends on who has possession of the original bill of lading and whether the bill has been indorsed: *The Starsin* [2003] 1 Lloyd's Rep 571; [2004] 1 AC 715 at [74] (per Lord Hoffman). The features of the bills of lading in this case become relevant when assessing the evidence of fraud: see [86], [127].

First drawdown request

82. Mr Mondoca said that, for each drawdown request, the insured required the Phoenix entity to submit a copy of the relevant trade and shipping documents, being a purchase contract, commercial invoice and bills of lading underlying the commodity transaction.

83. On 20 February 2020, Aravind Menon, Head of Treasury (South-East Asia) for Phoenix Pte Ltd, emailed a drawdown request to Mr Mondoca, copied to Dev Sharma, Finance Manager. Attached to the email were two Murabaha Requests from Phoenix Global DMCC in the form of Schedule 2 to the Master Murabaha Agreement. One request was in respect of Australian desi chickpeas (the first Murabaha Request) whilst the other was for Australian faba beans (the second Murabaha Request), to be purchased from Avon for US$726,782.10 and US$425,224.98 respectively. It will be recalled that, in making the Murabaha Request, Phoenix Global DMCC confirmed each of the representations in clause 13 of the Master Murabaha Agreement (extracted at [27]) and confirmed that each condition specified in clause 4.3 (extracted at [30]) was satisfied as at the date of the request.

84. In support of the purchase of chickpeas, the email also attached the three bills of lading referred to at [61] and three bills of lading referred to at [66]. For the faba beans, five bills of lading were attached, being those described at [59] and [62]. Also attached to the email was:

    1. a Purchase Contract between Avon and Phoenix Global DMCC dated 10 January 2020, by which Phoenix Global DMCC agreed to buy 1,200 megatonnes of Australian desi chickpeas and 1,000 megatonnes of faba beans from Avon (payment terms were "cash against documents", with title to the goods to pass to the buyer on payment of the invoice in full); and

    2. a Commercial Invoice issued by Avon to Phoenix Global DMCC dated 17 February 2020 for Australian desi chickpeas (1,286 megatonnes) and Australian faba beans (1,005 megatonnes) in the amount of US$1,152,007.08.

85. Following the lifecycle of the 'supply chain finance' outlined in Mr Mondoca's Information Memorandum, the Purchase Contract appeared to have been issued at the commencement of the particular supply, whilst the Commercial Invoice recorded the precise tonnage delivered, either to the ship or on arrival: see [12]. On its face, the Murabaha Request was to obtain funds to complete the purchase of the commodities which Phoenix Global DMCC had agreed to purchase some weeks earlier.

86. The documents were a little unusual. Under the Purchase Contract, dated 10 January 2020, Phoenix Global DMCC was the buyer of the commodities, with payment "cash against documents" and title to pass on payment in full. However, under the bills of lading – issued on various dates from 15 January 2020 to 2 February 2020 – Phoenix Global DMCC was the shipper with the consignee "to order". As such, the bills of lading were 'negotiable'. Unless Avon was holding the original bills of lading, this arrangement put the commodities at Phoenix Global DMCC's disposal before Avon had been paid. The documents did, however, broadly accord with Mr Mondoca's description of the proposed transaction in his Information Memorandum: see [12]. The difference was that the Financier was being asked to advance funds much later in the "operational flow"; rather than advance funds to Australian farmers up to 30 days prior to delivery into the Phoenix Group's warehouse, the Financier was being asked to advance funds when the commodities had already been shipped.

87. Mr Mondoca said that, on receiving the relevant trade and shipping documents, he checked that the details in the purchase contract, commercial invoice and bills of lading were consistent including: whether the purchase contract and commercial invoice listed the correct counter parties; whether the details of the seller and buyer, and the prices and quantity of the product, were consistent between the purchase contract and commercial invoice; whether the purchase contract and commercial invoice detailed the same product contained in the bill of lading; and, whether the bill of lading detailed the quantity of the product. Mr Mondoca did these checks on receipt of each set of contracts, invoices and bills of lading for each drawdown and only advanced funds after having completed these checks. For each advance, the information contained in the purchase contract, commercial invoice and bill of lading was consistent.

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88. Further, Mr Mondoca said that he verified the bills of lading for each drawdown request via the website for the shipping line in question. In the industry, such a search is called "BL verification", the purpose of which is to: validate that the shipment exists; ascertain the port of loading and discharge, the departure date and estimated time of arrival; and ensure that, at the time the Phoenix entities made the request for financing, the cargo was still on the water and had not already arrived at its destination. From a tracking report obtained from the websites, Mr Mondoca was able to check the bill of lading number, the shipping company, the vessel name, the ship movement details, the number of containers and the container identification numbers. For each bill of lading, Mr Mondoca checked the information on the face of the bill of lading to satisfy himself that it was consistent with the tracking report. For each bill of lading, the information contained from the tracking report was consistent with the information on the face of the bill of lading

89. For the first drawdown request, Mr Mondoca obtained tracking information in respect of the bills of lading issued by Mediterranean Shipping Co and Cosco Shipping Lines Co Ltd on 22 February 2020. It was apparent from this data that the containers were then in transit. Mr Mondoca validated key items on the bill of lading and downloaded the information for internal audit purposes.

90. Having completed the checks described at [87]-[89], on 23 February 2020, Mr Mondoca emailed three documents to Phoenix in respect of each Murabaha Request, being:

    1. a Purchase Instruction from the insured (with the instruction, "Phoenix to insert bank account details ... to send the Cost Price"),

    2. a Purchase Confirmation from Phoenix Global DMCC ("to be signed by Phoenix"), and

    3. an Offer Letter and Acceptance ("executed by [the insured], to be accepted by Phoenix").

That is, the insured prepared for its clients the documents necessary to complete the drawdown, as specified by the Purchase Agency Agreement and Master Murabaha Agreement.

91. On 25 February 2020, Mr Sharma emailed Mr Mondoca, attaching the documents provided by Mr Mondoca, now completed for each purchase. The documents comprised:

    1. two Purchase Instructions under the Purchase Agency Agreement, dated 22 February 2020, from the insured to Phoenix Global DMCC in respect of desi chickpeas and faba beans;

    2. two Purchase Confirmations from Phoenix Global DMCC to the insured, dated 23 February 2020, confirming that Phoenix Global DMCC had purchased the Approved Commodities from the applicable Commodity Seller on the insured's behalf in accordance with the Purchase Instruction; and

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3. two Offer Letter and Acceptance dated 24 February 2020, by which the insured confirmed that it had purchased the Commodities specified in the Murabaha Request from the Commodity Seller and offered to sell the Commodities to Phoenix Global DMCC for the Cost Price and Profit Amount; the Acceptance Notice was also dated 24 February 2020.

According to the Offer Letter and Acceptance, the Deferred Payment Date was 23 June 2020.

92. Also on 25 February 2020, the insured transferred AU$983,614.87 and AU$575,492.45 to Phoenix Agrifoods, being the AUD equivalent of the first and second Murabaha Requests, less the insured' s fee. Bank statements for Phoenix Agrifoods record that, on 27 February 2020, the first drawdown funds were withdrawn from its bank account, converted to US$1,019,032.54 and deposited into Phoenix Agrifoods' USD currency account, then remitted to Phoenix DMCC.

93. That is, rather than the insured and Phoenix Global DMCC taking each of the steps described in the Master Murabaha Agreement and Purchase Agency Agreement in turn – Phoenix Global DMCC purchasing the commodities as the undisclosed agent of the insured followed by the insured offering to sell, and Phoenix Global DMCC agreeing to buy, the commodities – the parties executed documents which stated that each of these steps had been taken in the correct sequence and, having done so, the insured advanced the requested funds. I will return to whether this matters under the policy in due course.

Shipments continue

94. On 23 and 24 February 2020, 10 containers of Australian nugget lentils were loaded in Adelaide onto *APL DANUBE* for Jebel Ali, UAE. ANL issued a bill of lading ending 9169 (only a draft bill is in evidence). The identity of the shipper is obscured but the address is visible and is that of Phoenix Global DMCC. (This became part of the ninth Murabaha Request.)

95. Also on 23 and 24 February 2020, 20 containers of Australian nipper lentils were also loaded onto *APL DANUBE* bound for Chittagong, Bangladesh. ANL issued a bill of lading ending 907A (the first pages of the bill are missing and the shipper and consignee, if any, are not known). A further 20 containers were loaded, for which ANL issued a bill of lading ending 907B (while tracking information for the bill of lading was obtained, a copy of the bill was not in evidence.) (This became part of the tenth Murabaha Request.)

96. On 26 and 27 February 2020, 10 containers of nugget lentils were loaded onto *CONTI EVEREST* in Adelaide bound for Karachi, Pakistan. ANL issued a bill of lading ending 2964, of which only a draft is in evidence. The identity of the shipper is obscured but the address is visible and is that of Phoenix Global DMCC. A further 10 containers of Australian nugget lentils were loaded onto the same vessel and bills of lading issued by Mediterranean Shipping Co SA ending 4538 and 6094.

Only draft bills of lading are in evidence. The shipper in each case was noted as Phoenix Global DMCC, and the consignee was marked "To Order". (This became part of the ninth Murabaha Request.)

Second and third drawdown requests

97. On 25 February 2020, Mr Menon submitted a second drawdown request to Mr Mendoca, copied to Mr Sharma. Attached to the email were two Murabaha Requests in the form of Schedule 2 to the Master Murabaha Agreement. Both were dated 20 February 2020. One request was in respect of Australian desi chickpeas (the third Murabaha Request) and the other was in respect of Australian faba beans (the fourth Murabaha Request), to be purchased from Avon for US$1,182,720.15 and US$365,404.32 respectively.

98. Attached to the email was a Purchase Contract between Avon and Phoenix Global DMCC dated 13 January 2020, by which Phoenix Global DMCC agreed to buy 2,000 megatonnes of Australian desi chickpeas and 800 megatonnes of faba beans, on the same terms as the earlier Purchase Contract referred to at [84]. Also attached was a Commercial Invoice issued by Avon to Phoenix Global DMCC dated 18 February 2020 for Australian desi chickpeas (2,093 megatonnes) and Australian faba beans (864 megatonnes) in the amount of US$1,548,124.47.

99. In support of the purchase of chickpeas, the email attached the two bills of lading referred to at [69]-[70] and the six bills of lading referred to at [75]. For the faba beans, five bills of lading were attached, being those described at [65] and [73]. To verify the information contained in the bills of lading, on 25 and 27 February 2020, Mr Mondoca downloaded information from the Ocean Network Express website, Mediterranean Shipping Co website, Cosco Shipping Lines Co Ltd website and CMA CGM website for each of the bills of lading in question. Again, the documents were a little unusual, as described at [86].

100. On 27 February 2020, Mr Sharma sent Mr Mondoca a third drawdown request. Attached to the email were two Murabaha Requests issued by Phoenix Global DMCC dated 25 February 2020: one in respect of Australian hard wheat (the fifth Murabaha Request) and the other for Australian whole red lentils (the sixth Murabaha Request), to be purchased from ACME Summit General Trading LLC for US$428,676.25 and US$655,554.80 respectively. Attached to the email was a Purchase Contract between ACME and Phoenix Global DMCC dated 20 January 2020, by which Phoenix Global DMCC agreed to buy 1,000 megatonnes of Australian hard wheat and 1,000 megatonnes of red lentils. Also attached was a Commercial Invoice issued by ACME to Phoenix Global DMCC dated 24 February 2020, for Australian hard wheat (1,009 megatonnes) and Australian red lentils (978 megatonnes) in the amount of USD$1,084,231.05.

101. In support of the purchase of wheat, the email also attached the two bills of lading referred to at [71] and [74]. For the lentils, three bills of lading were attached, being those described at [58], [60] and [63]. (It may be recalled that the lentils in the bill of lading at [58] had already arrived in India a month earlier). To verify the information contained in the bills of lading relevant to the third drawdown, on 27 February 2020, Mr Mondoca downloaded information from the Orient Overseas

Container Line website, Pacific International Lines website, Ocean Network Express website, CMA CGM website, Mediterranean Shipping Co website and Hamburg Sud website for each of the bills of lading in question. As mentioned, this search should have revealed that the lentils in the bill of lading at [58] were no longer in transit, having arrived at their destination a month earlier. Again, the documents were a little unusual, as described at [86]. Further, Phoenix Global DMCC had shipped some of the commodities *before the Purchase Contract* and thus paid freight for the shipment of commodities to which it apparently had no rights (20 containers of red lentils the subject of the Mediterranean Shipping Company SA bill of lading ending 5049, which were marked as shipped on board on 1 January 2020.)

102. On 27 February 2020, Mr Mondoca sent an email to Mr Sharma at Phoenix in respect of each Murabaha Request forming part of the second and third drawdown requests, in the following terms:

> Please find attached the pertinent documents for this drawing:
>
> 1. Purchase instruction from Thera – we kept same bank remittance details per last drawing – please advise if otherwise
>
> 2. Purchase Confirmation from Phoenix DMCC – to be signed by Phoenix
>
> 3. Offer Letter and Acceptance – executed by Thera, to be accepted by Phoenix…
>
> TAC will transfer you the net of: Cost Price and Value Date Sale Price Amount as defined in the Offer Letter and Acceptance …
>
> Please confirm your agreement by returning a signed copy by email

103. Again, the insured was assisting its customer by preparing the necessary documents under the Purchase Agency Agreement and Master Murabaha Agreement to complete the drawdown. Later that day, Mr Sharma replied separately for each Murabaha Request, attaching:

    1. a Purchase Instruction from the insured to Phoenix Global DMCC dated 26 February 2020;

    2. a Purchase Confirmation from Phoenix Global DMCC to the insured dated 27 February 2020; and

    3. an Offer Letter and Acceptance from the insured to Phoenix Global DMCC dated 27 February 2020.

The Deferred Payment Date on each Offer Letter and Acceptance was 26 June 2020.

104. On 27 February 2020, the insured advanced the second and third drawdown. For the second drawdown, the insured transferred AU$1,625,111.66 and AU$502,082.27 to Phoenix Agrifoods, being the AUD equivalent to the third and fourth Murabaha Requests, less the insured's fee. For the third drawdown, the insured transferred AU$589,020.80 and AU$900,762.32 to Phoenix Agrifoods, being the AUD equivalent to the fifth and sixth Murabaha Requests, less the insured's

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fee. Again, rather than the insured and Phoenix Global DMCC taking each of the steps described in the Master Murabaha Agreement and Purchase Agency Agreement in turn, the parties executed documents which stated that each step had been taken in the correct sequence and the insured then advanced the requested funds.

105. Bank statements for Phoenix Agrifoods record that, on 2 March 2020, the funds were withdrawn, converted to USD $2,350,311.69 and deposited into Phoenix Agrifoods' USD currency account then remitted to Phoenix DMCC.

Fourth drawdown request

106. On 3 March 2020, Mr Sharma submitted a fourth drawdown request to Mr Mondoca. Attached to the email were Murabaha Requests dated 27 February 2020 in respect of Australian noodle wheat (the seventh Murabaha Request), Australian canola (the eighth Murabaha Request), Australian nugget lentils (the ninth Murabaha Request), Australian nipper lentils (the tenth Murabaha Request) and Australian desi chickpeas (the eleventh Murabaha Request). These commodities were to be purchased from ACME for US$150,098.20, US$220,677, US$470,695.60, US$435,628.70 and US$282,748.60 respectively.

107. Attached to the email was a Purchase Contract between ACME and Phoenix Global DMCC dated 23 January 2020, by which Phoenix Global DMCC agreed to buy 500 megatonnes of noodle wheat, 500 megatonnes of canola, 1,000 megatonnes of nugget lentils, 1,000 megatonnes of nipper lentils and 500 megatonnes of desi chickpeas. Also attached was a Commercial Invoice issued by ACME to Phoenix Global DMCC dated 26 February 2020 in respect of the commodities, totalling US$1,559,848.10.

108. In respect of the proposed purchase of Australian noodle wheat, the bill of lading referred to at [67] was attached. In respect of the purchase of Australian canola, the bill of lading referred to at [68] was attached. In respect of the purchase of Australian nugget lentils, the seven bills of lading referred to at [64], [94] and [96] were attached (it will be recalled that several of these bills were in draft or incomplete). In respect of the purchase of Australian nipper lentils, two bills of lading referred to at [95] were attached, albeit one of the bills of lading does not appear to have been provided. For the purchase of Australian chickpeas, the two bills of lading referred to at [76] were attached. Again, the documents were a little unusual, as described at [86].

109. On 5 March 2020, Mr Mondoca obtained tracking information for the bills of lading accompanying the fourth drawdown request from the websites for Hapag-Lloyd, TS Lines and ANL. (This review presumably revealed that, 25 February 2020, the Australian noodle wheat in the Hapag-Lloyd bill of lading ending 9480 had arrived in Vietnam and, 4 March 2020, the Australian nugget lentils in the ANL bill of lading ending 2915 had arrived in the UAE.) Mr Mondoca said he conducted the same process to obtain tracking information for the bill of lading ending 7700 from the Ocean Network Express website, but did not save the verification

information to the insured's files. (The tracking information has, however, been obtained for the purposes of these proceedings.) No tracking information appears to have been obtained in respect of the two draft bills of lading issued by Mediterranean Shipping Co.

110. On 5 March 2020, the insured sent Phoenix an email for each Murabaha Request forming part of the fourth drawdown request, in the same terms as extracted at [102]. Later that day, Mr Sharma replied separately to the insured for each Murabaha Request, attaching:

    1. a Purchase Instruction from the insured to Phoenix Global DMCC dated 4 March 2020;

    2. a Purchase Confirmation from Phoenix Global DMCC to the insured dated 5 March 2020; and

    3. an Offer Letter and Acceptance from the insured to Phoenix Global DMCC dated 5 March 2020.

The Deferred Payment Date on each Offer Letter and Acceptance was 3 July 2020.

111. On 5 March 2020, the insured advanced funds to Phoenix Agrifoods in respect of the Murabaha Requests, being: for Australian noodle wheat, AU$204,061; for Australian canola, AU$300,014.05; for Australian nugget lentils, AU$639,918.49; for Australian nipper lentils, AU$592,244.45; for Australian desi chickpeas, AU$384,401.42, from which the insured deducted an administrative fee of AU$132,000 then owing by Phoenix Agrifoods, with the balance being AU$252,401.42. Again, the parties executed documents which stated that each of the steps described in the finance documents had been taken in the correct sequence and the insured then advanced the requested funds.

112. On 6 March 2020, the proceeds of all but the advance for Australian nipper lentils, totalling AU$1,396,394.96, were withdrawn and converted into US$921,341.39 and remitted to Phoenix Global DMCC. On 10 March 2020, the remaining advance of AU$592,244.45 was, according to Phoenix Agrifoods' bank statement "transfer[red] to DMCC" in Australian dollars but, in fact, was transferred to an account in the name of Phoenix Commodities Australia Pty Ltd.

Claim on the policy

113. Phoenix Group was then in a parlous financial state. An email from director, Guarav Dhawan, to Phoenix's banks on 16 April 2020 advised that the Phoenix Group had moved into hedging but the trading position had "shot up" during the last week of February and, by 9 March 2020 "had reach [ed] astronomical proportions". On 20 April 2020, Phoenix Commodities Pvt Ltd was placed in liquidation. On 27 April 2020, Mr Dhawan wrote to the Phoenix Group's financiers, including the insured, requesting a continuation of financial support for the subsidiaries "to give management time to stabilise the business and seek new external funding."

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114. On 28 April 2020, Mr Mondoca reported this development to Mr Allen and the broker, noting that the funds advanced to Phoenix Agrifoods and Phoenix DMCC were due to be repaid at the end of June or early July 2020. Solicitors were engaged to advise how best to protect the insured's interests; "please share these updates with Underwriters and let us know if they have any suggestions or comments". On 30 April 2020, the broker confirmed that the insurer had been informed.

115. On 1 May 2020, the insured issued a formal demand for payment to Phoenix Agrifoods and Phoenix Global DMCC, in the following terms:

> 3. An Event of Default has occurred under clause 15.11 of the master murabaha agreement in that a liquidator has been appointed to Phoenix Commodities Pvt Ltd … or its assets.
>
> 4. In consequence of the Event of Default, the Financier declares, pursuant to clause 15.22 (b) of the master murabaha agreement, that each Murabaha Contract is terminated with immediate effect and that the Deferred Sale Price (determined as though the final Deferred Sale Date is the Early Termination Date) for each outstanding Murabaha Contract and all other amounts accrued or outstanding under the Finance Documents, including the master murabaha agreement, is immediately due and payable.
>
> 5. The Financier demands immediate payment of the Deferred Sale Price for each outstanding Murabaha Contract as at the date of this letter of AU$7,397,893.58 (which includes a Profit Amount of AU$101,169.79 as at the date of this letter)

116. A formal demand for payment was also made to Phoenix Commodities for immediate payment of the Deferred Sale Price for each outstanding Murabaha Contract. The demands went unanswered and no payment was received. A claim was made on the policy on 6 May 2020. An initial question arose as to whether the insured was entitled to claim on the policy before the Deferred Payment Dates in June or July 2020. On 9 June 2020, Phoenix Global DMCC also went into liquidation. The insured pressed the insurer to determine its claim. On 23 June 2020, the Deferred Payment Date fell due in respect of the first drawdown: see [91(c)]. On 26 June 2020, the Deferred Payment Date arrived in respect of the second and third drawdowns: see [103]. On 3 July 2020, the Deferred Payment Date arrived in respect of the fourth drawdown: see [110].

117. On 16 July 2020, the insured denied indemnity, in short, because the transactions conducted between the insured and the Phoenix Group were not compliant with Islamic law as the insured had not established that it paid each commodity seller and acquired title to the commodities prior to selling the commodities to the the Phoenix Group. On 30 September 2020, the insured commenced these proceedings. Also on 30 September 2020, Avon went into liquidation and Mr Thio was appointed as liquidator. At some point, ACME went into liquidation as well.

Sham contracts come to light

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118. In October and November 2021, the Court issued a series of subpoenas to Westpac Banking Corporation, Avon and ACME at the insurer's request. The insurer obtained affidavits from Mr Thio, the liquidator of Avon, and Mr Nagaria, the former managing director of ACME. As a consequence, the questionable nature of the Purchase Contracts and Commercial Invoices came to light. In February 2022, the insurer amended its pleading, contending that the commodity purchases from Avon and ACME were fabricated by Phoenix Global DMCC or Phoenix Agrifoods, this being another reason that the transactions did not comply with Sharia principles and the policy did not respond.

119. It will be recalled that the first and second drawdown requests were based upon the purchase of commodities from Avon. Mr Thio has reviewed Avon's books and records, and found no record that Avon traded in or supplied desi chickpeas or faba beans at that time. The Purchase Contract and Commercial Invoice were not found amongst the company's records.

120. As to the comprehensiveness of the search undertaken by Mr Thio, he took possession of Avon's books and records from the company's director on Mr Thio's appointment as liquidator. He was provided with hard and soft copy documents. The hard copy documents included sales invoices, purchase invoices, bank statements and similar documents. Mr Thio understood from the director that he had been provided with all of the company's records. Following an initial review, the hard copy records were sorted by Mr Thio's staff into calendar year and, within each year, into types of records such as bank statements, before being placed into cartons and stored in a warehouse. A list of the documents kept in each carton was prepared and, on receipt of a subpoena in these proceedings, Mr Thio's staff reviewed the relevant cartons and their contents but informed Mr Thio that they were unable to find the Purchase Contracts or Commercial Invoices said to have been issued in respect of Phoenix Global DMCC. Mr Thio then double-checked the records by looking through the records for February and March 2020, especially invoices and purchases, but could not locate the documents either.

121. As to whether any of the funds advanced in the first or second drawdown were used to pay Avon for the commodities, Mr Thio has reviewed Avon's bank statements and found no payment in respect of the Purchase Contract and Commercial Invoice said to have been issued by Avon. Nor could Mr Thio locate any record which indicated that Avon had traded in desi chickpeas or faba beans in February 2020. As to the veracity of Mr Thio's search, he was given a list of Avon's bank accounts by the company's director and worked on the basis of that list; there were no missing bank statements and nothing to suggest that he should write to other banks to see if there were any other bank accounts.

122. Perhaps consistently with this, bank statements produced by Westpac Banking Corporation on subpoena in respect of accounts held by Phoenix Agrifoods do not record any payments to Avon either. That said, presumably any payment for the commodities would be made by the purchaser, Phoenix Global DMCC. The bank statements of Phoenix Agrifoods show that the funds were wholly remitted to Phoenix Global DMCC but the bank statements of that company are not in evidence.

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123. It will be recalled that the third and fourth drawdown requests were based upon the purchase of commodities from ACME. ACME did trade in agricultural commodities. ACME had, in the past, bought from and sold commodities to Phoenix Global DMCC. Mr Nagaria (the former managing director of ACME) was the person at ACME who negotiated the price and product of such transactions, before passing the transaction to his staff to complete. However, Mr Nagaria has never seen the Purchase Contract or Commercial Invoice before these proceedings and had no knowledge of ACME entering into such a transaction with Phoenix Global DMCC. During the period in which ACME was supposed to have entered into the Purchase Contract with Phoenix Global DMCC, Mr Nagaria was seriously ill and few trades were conducted at all.

124. As to the reliability of the search undertaken by Mr Nagaria, he checked hard copy files and an Excel spreadsheet which he maintained to record all commodity transactions. ACME maintained a purchase order file for Phoenix, in which hard copies of all purchase orders, and the attached sales contract, were kept. He could not find the Purchase Contract or Commercial Invoice relied upon by Phoenix Global DMCC to support its drawdown request.

125. Further, Mr Nagaria said that the Commercial Invoice did not come from ACME as the letterhead was different, "When I saw the documents, I knew that there was something wrong because it doesn't look right." Further, "We don't use that letterhead anymore. It was a long time back." Whilst the logo is similar, ACME places the logo on the righthand side of the page rather than the centre and "It should be underlined". The logo looked "stretched" and "doesn't look right". Further, "We don't use [that] address anymore. We used to do a long time back." (A comparison of the letterhead on the documents submitted to the insured and letterhead annexed to Mr Nagaria's affidavit, which he identified as genuine, were obviously different.) In addition, Mr Nagaria was the only authorised person in the company to sign such documents. The signature on the documents was not his, nor did he recognise the signature on the company stamp as being that of the person in the company with custody of the stamp.

126. As to whether any of these funds were used to pay ACME for the commodities in question, ACME has produced its bank statement for this period; no monies were received from Phoenix DMCC at this time. Perhaps consistently with this, bank statements produced by Westpac Banking Corporation on subpoena in respect of accounts held by Phoenix Agrifoods do not record any payments to ACME either. That said, the funds were wholly remitted to Phoenix Global DMCC – who likely would have made any payment as purchaser of the commodities – and the bank statements for Phoenix Global DMCC are not in evidence.

127. Taking into account Mr Mondoca's evidence and that of Mr Thio and Mr Nagaria, together with the unusual features of the documents submitted in support of the drawdown requests – that Phoenix Global DMCC agreed to buy commodities from Avon but then shipped the commodities under a 'negotiable' bill of lading before payment – it appears that the commodities existed and had been shipped under the bills of lading but were not, in fact, the subject of the Purchase Contract and Commercial Invoice. That is, the Purchase Contract and Commercial Invoice were created by the Phoenix Group, presumably in order to satisfy the requirements of the Master Murabaha Agreement and thereby obtain finance. There is no suggestion that the insured was

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aware that the Purchase Contract and Commercial Invoice were not genuine, nor identified any unusual features of the documents and the bills of lading at the time nor could have been expected to do so.

Sharia compliance

128. Whilst Mr Allen said the financing of the Phoenix entities was intended to be Sharia compliant, the insured did not contest Mr Khan's expert evidence that the transactions were not compliant and I have no reason to find otherwise. Mr Khan explained that the Accounting and Auditing Organisation for Islamic Financial Institutions (*AAOIFI*) has developed Sharia standards for major Islamic financing structures, including the AAOIFI Sharia Standard No 8 on Murabaha issued on 16 May 2002. In addition, jurists have created a checklist of requirements for a valid contract under Sharia law, called the Pillars (*Arkan*) which must be present in order for a contract to be valid and binding. Amongst these requirements, there must be at least two independent, eligible parties free to enter into a contract. The goods the subject of a contract must be owned by the seller, either directly or in the name of another who acts as trustee and agent on behalf of the seller.

129. According to Mr Khan, the falsity of the underlying Purchase Contracts, unsurprisingly, does not satisfy the requirements for a valid contract under Islamic law. As the vendors of the commodities were not party to the fabricated documents, the Purchase Contracts did not constitute a Sharia-compliant sale contract, such that the insured's subsequent offer to sell the commodities under the offer letters also failed to satisfy Sharia requirements as it would be impossible for the insured to act as the seller as the insured had no actual ownership of the commodities. As such, the insured's offer to sell the commodities under the offer letters constituted a breach of the prohibition on selling a commodity before having actual or constructive ownership under Sharia. The subsequent sale of the commodities under the Murabaha contracts failed to satisfy the Sharia requirement that the parties to a contract consent by clear and unambiguous offer and acceptance. Mr Khan was of the view that the fabricated documents meant that the transactions did not involve any real sale or transfer of commodities, either to Phoenix Global DMCC or to the insured. The fact that no commodities were actually purchased meant that the transactions breached the requirement for a valid Murabaha Agreement. Consequently, all of the transactions, and any benefits claimed by the insured under the transactions in connection with ownership of the commodities which the insured did not acquire, would be invalid and unenforceable from a Sharia perspective.

130. Putting to one side the falsity of the Purchase Contracts and Commercial Invoices, Mr Khan also compared the contractual arrangements between the insured and the Phoenix Group with AAOIFI Sharia Standard No 8 on Murabaha and was of the opinion that each of the transactions were void from a Sharia perspective as non-compliant with the standard. As the Purchase Contract with either ACME or Avon was entered into before the Master Murabaha Agreement and Purchase Agency Agreement, Phoenix Global DMCC concluded the Purchase Contract as a buyer in its own right and not as an agent of the insured. As such, title to the commodities passed to Phoenix Global DMCC and not the insured; the commodities were not eligible to be the subject matter of a Murabaha Contract as this would constitute an *Inah* (sale and buyback) transaction: rule 2/2, AAOIFI Sharia Standard No 8 on Murabaha. Nor would it be possible for Phoenix Global

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DMCC to assign the Purchase Contract to the insured, as this is prohibited under Islamic law: rule 2/2/2, AAOIFI Sharia Standard No 8 on Murabaha.

131. Further, Mr Khan opined that, as the insured did not have legal title to the commodities, it would not be able to enter into the Murabaha Contract to sell the commodities; the Murabaha Request, Purchase Instructions and Purchase Confirmation were void arrangements as the assets belonged to Phoenix Global DMCC and not the insured: rules 3/1 and 3/2, AAOIFI Sharia Standard No 8 on Murabaha. Further, if Phoenix Global DMCC entered into the Purchase Contract with either ACME or Avon on behalf of the insured, then Phoenix Global DMCC should have disclosed that it was acting as agent of the insured. Whilst rule 3/1/7 of AAOIFI Sharia Standard No 8 on Murabaha permits the parties to agree for the agent to purchase assets without disclosing its agency, neither the Master Murabaha Agreement nor the Purchase Agency Agreement permitted the agent to act as an undisclosed agent. This was said to provide further proof that Phoenix Global DMCC's entry into the Purchase Contract was as a buyer and not as agent of the insured.

PARTIES' POSITIONS

132. The insured contended that it was entitled to be indemnified as Phoenix Commodities had failed to honour the guarantee following the insured's demand; the ***Insured Risk*** as defined in the policy had eventuated, causing ***Loss*** within the meaning of the policy.

133. The insurer denied that the insured was entitled to indemnity on three bases, each following upon the suggested failure of the insured to purchase commodities from vendors and then on-sell the commodities to the Phoenix Group in accordance with the Master Murabaha Agreement and Sharia principles. As a consequence, the insurer contended that:

    1. no Deferred Sale Price was payable was under the Master Murabaha Agreement;

    2. no obligation to repay an ***Advanced Payment*** arose under the policy; and

    3. the condition precedent in clause 3.4 of the policy was not satisfied.

134. These issues turn on the construction of the policy and the documents establishing the finance facility. In considering these matters, I have had the benefit of detailed written and oral submissions by learned senior counsel Jeremy Giles SC and Richard Scruby SC but have not repeated these submissions in this already lengthy judgment.

CONSTRUCTION OF POLICIES

135. A policy of insurance is a commercial contract and should be given a businesslike interpretation, paying attention to the language used by the parties, the commercial circumstances that the document addresses and the objects which it was intended to secure: *McCann v Switzerland Insurance Australia Limited* (2000) 203 CLR 579; [2000] HCA 65 at [22] (per Gaudron J); *Liberty Mutual Insurance Company Australian Branch (t/as Liberty Specialty Markets) v Icon Co (NSW) Pty Ltd*

[2021] FCAFC 126; (2021) 154 ACSR 126 at [151]-[152] . The contract is interpreted as at the date on which it was entered into: *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544; [2017] HCA 12 at [16] (per Kiefel, Bell and Gordon JJ), [77] (per Nettle J).

136. The meaning of the policy is determined objectively, by reference to what a reasonable person would have understood the policy to mean having regard not only to the text of the document but to the surrounding circumstances known to the parties and the purpose and object of the transaction: *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451; [2004] HCA 35 at [22] (per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ). The context includes the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract: *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; [2015] HCA 37 at [46] (per French CJ, Nettle and Gordon JJ) citing *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; [2014] HCA 7; *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337; [1982] HCA 24.

137. Appreciation of the commercial purpose or objects is facilitated by an understanding of the genesis of the transaction, the background, the context and the market in which the parties are operating. The Court is entitled to approach the task of construction on the assumption that the parties intended to produce a commercial result, construing the contract so as to avoid making commercial nonsense or working commercial inconvenience: *Electricity Generation Corporation v Woodside Energy Ltd* at [35] (per French CJ, Hayne, Crennan and Kiefel JJ), citing *Codelfa* at 350 (per Mason J). As observed in *Onley v Catlin Syndicate Ltd (as the underwriting member of Lloyd's Syndicate 2003)* (2018) 360 ALR 92; [2018] FCAFC 119, "It goes without saying that a construction that avoids capricious, unreasonable, inconvenient or unjust consequences, is to be preferred where the words of the agreement permit": at [33] (per Allsop CJ, Lee and Derrington JJ).

138. The contract should be construed as a whole "since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another"; commercial contracts should be construed fairly and broadly, without being too astute or subtle in finding defects: *Australian Broadcasting Commission v Australian Performing Right Association Ltd* (1973) 129 CLR 99 at 109 (per Gibbs J). In construing a policy, preference is given to a construction supplying a congruent operation to the various components of the whole: *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522; [2005] HCA 17 at [16] (per Gleeson CJ, McHugh, Gummow and Kirby JJ).

139. Exclusion clauses are to be construed in the same way and, where appropriate, construing the clause *contra proferentem* in the case of ambiguity: *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500 at 510 (per Mason, Wilson, Brennan, Deane and Dawson JJ). In *HDI Global Specialty SE v Wonkana No 3 Pty Ltd* (2020) 104 NSWLR 634; [2020] NSWCA 296, Meagher JA and Ball J followed (at [29]), the observations of Lord Hodge in *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd* [2017] AC 73; [2016] UKSC 57 at [7] :

> An exclusion clause must be read in the context of the contract of insurance as a whole. It must be construed in a manner which is consistent with and not repugnant to the purpose of the insurance contract. There may be circumstances in which in order to achieve that end, the court may construe the exclusions in an insurance contract narrowly.

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140. As to particular types of insurance policies, it was observed in *Liberty Mutual Insurance Co v Icon Co (NSW)* at [152]: (citations omitted)

> The working out in a coherent and congruent fashion of the operation of a market specific insurance policy requires a businesslike interpretation to bring about a commercial result based on what a reasonable business person would have understood the policy to mean … The principle that a policy is to be construed … so as to bring about commercial efficacy and reflect common sense … is to be given concrete operation, not passing lip-service. To the extent that words used in an insurance policy have the capacity for broader or narrower operation, such constructional choice or ambiguity will be resolved by appreciating the context, including the market, in which the parties are operating … It should always be recalled, however, that a broad or a narrow meaning of a policy may only reflect the breadth or the narrowness of cover that has been purchased by the premium …

141. The quality of the drafting of a policy may also be taken into account when construing its terms, as Moshinsky, Derrington and Colvin JJ explained in *Star Entertainment Group Limited v Chubb Insurance Australia Ltd* [2022] FCAFC 16 at [14] :

> The policy should be construed as a whole … it should not be approached by isolating particular fragments or disregarding its overall character. … This also requires consideration of the style, layout, language and structure of the instrument. Some commercial instruments present as having been drafted with the coherence and consistency in terminology and grammatical expression that may be expected of an experienced and expert commercial lawyer. In such cases it is appropriate for the language to be construed by reference to the customary forms adopted in such instruments. Others present as 'a clumsily tailored variation of an ill-fitting off-the shelf precedent': *Ecosse Property Holdings* at [51] (Gageler J). In such instances, no reasonable business person would interpret the instrument with the same eye to differences in language and terminology as might be appropriate for instruments that have a different form of structure and expression. Some commercial instruments, are relatively informal or are brought into existence to meet the exigencies and necessities of everyday commercial life without time or inclination to ensure neatness of grammar and consistency in terminology. Others present as being carefully considered and settled by those with considerable experience in their drafting. All such characteristics of the instrument as a whole should be brought to account when giving a businesslike construction to the instrument.

142. This case bears strong similarities to *MGICA Ltd v United City Merchants (Australia) Limited* (1986) 4 ANZ Ins Cas 60-729. Whilst everything turns on the specific terms of each policy, it is nonetheless a useful example of how the principles of construction are applied. In *MGICA* , the insured provided trade finance to its customers against proof of transactions involving the purchase of goods. The insured's business operated on the faith of invoices and documents supplied by its customers, and this was fully disclosed to the insurer. The insured obtained a credit insurance policy, which provided cover in the event that a customer failed to pay the insured by reason of insolvency. A customer submitted false invoices to the insured, who advanced finance. The

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customer went into liquidation. The insurer refused indemnity on the basis that there was, in fact, no purchase of goods; the policy envisaged the sale of goods and, unless the sale actually took place, then the insured was not entitled to indemnity.

143. Although the policy referred to the goods being "sold", Kirby P considered that, when the policy was viewed as a whole and having regard to the nature of the insured's business as fully disclosed to the insurer, "sold" meant sold according to the invoices and documents provided by the customer. At 74,354-74,355:

> There is no doubt that [the clause] appears, read in isolation, to confirm the necessity of an actual purchase and sale of goods, as the insurer contends. It is this clause which the insurer suggests clinches its argument that the appearance of documents is not enough, that the actuality of the sale and purchase of goods is necessary ...
>
> But this interpretation runs into certain practical difficulties which have to be reconciled with the operation of [the clause] in the context of the whole of the policy. The insured ... operates exclusively on the faith of invoices and other documents. Accordingly the reference in [the clause] to the month in which the goods were sold must be taken to mean the month in which the insured customer signifies to the insured by invoices and otherwise that the goods were sold. ... No other interpretation is compatible with the ... business of the insured as disclosed to and accepted by the insurer. ...
>
> The scheme and structure of the policy depended upon documents. It relieved the parties of the necessity to scrutinise the transactions behind those documents for the very good reason that time and business efficacy would not permit it.
>
> ... the policy was intended to operate, as the parties planned, upon the faith of invoices and other documents, given that they would normally (with the other checks carried out) provide satisfactory protection against fraud.

144. Likewise, McHugh JA observed that the insured advanced money to customers on the production of documents evidencing the purchase and possession of goods. Whether title to the goods had passed to the customer was a matter within the customer's knowledge but not matters which the insured and insurer contemplated would be within their knowledge. At 74,360-74,361:

> The Insured's knowledge of the date of a "sale" could only come from the invoice. The invoice may or may not purport to show the sale date. ... I do not think that the Insured and the Insurer can have intended that the words "goods were sold" be read literally. ... when [the clause] is read with the procedures of the Insured in mind ... the goods were sold according to the date shown in the Invoice.

Defined terms

145. The insurer attaches some significance to various defined terms, both in the policy and the finance documents. The principles as to how such terms should be interpreted in statutory instruments are well settled and have been transposed to assist in the construction of commercial contracts: *Vincent Nominees Pty Ltd v Western Australian Planning Commission* [2012] WASC 28;

(2012) 187 LEGRA 303. With respect to statutory instruments, generally "[t]he function of a definition clause in the statute is merely to indicate that when particular words or expressions the subject of definition, are found in the substantive part of the statute under consideration, they are to be understood in the defined sense or are to be taken to include certain things which, but for the definition, they would not include. Such clauses are, therefore, no more than an aid to the construction of the statute and do not operate in any other way": *Gibb v Federal Commissioner of Taxation* (1966) 118 CLR 628 at 635 (per Barwick CJ, McTiernan and Taylor JJ) (emphasis added). As McHugh J explained in *Kelly v R* (2004) 218 CLR 216; [2004] HCA 12 at [103] :

> … the function of a definition is not to enact substantive law. It is to provide aid in construing the statute. Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment. There is, of course, always a question whether the definition is expressly or impliedly excluded. But once it is clear that the definition applies, the better – I think the only proper – course is to read the words of the definition into the substantive enactment and then construe the substantive enactment – in its extended or confined sense – in its context and bearing in mind its purpose and the mischief that it was designed to overcome. To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment.

146. In the few cases where definitions have been found to be of substantive effect, it has been said that this is indicative of 'poor drafting practice': *Commissioner of Taxation v Douglas* (2020) 282 FCR 204; [2020] FCAFC 220 at [98] ; *San v Rumble (No 2)* [2007] NSWCA 259 at [55] (per Campbell JA).

147. As to the application of these principles in the construction of commercial contracts, Beech J observed in *Red Hill Iron Ltd v API Management Pty Ltd* [2012] WASC 323 at [127] :

> Definitions do not have substantive effect. They are not to be construed in isolation from the operative provision(s) in which a defined term is used. Rather, the operative provision is to be read by inserting the definition into the provision: *Kelly v R* [2004] HCA 12 ; (2004) 218 CLR 216 [84], [103]; *Epic Energy (Pilbara Pipeline) Pty Ltd v Cmr of State Revenue* [2011] WASCA 228 [62], [150], [218] . Those cases dealt with statutory interpretation; the same principle applies in interpreting contracts: *Vincent Nominees Pty Ltd v Western Australian Planning Commission* [25] .

See also Greg Pynt, *Australian Insurance Law: A First Reference* (4th ed, 2018, LexisNexis) at 225; *Watson v Scott* [2016] 2 Qd R 484; [2015] QCA 267 (per McMurdo P) at [50]-[51]; *Bond v Chief Executive, Department of Environment and Heritage Protection* [2018] 2 Qd R 112; [2017] QCA 180 (per Morrison JA) at [11]; *AIG Australia Ltd v Kaboko Mining Ltd* [2019] FCAFC 96 at [43] (per Allsop CJ, Derrington and Colvin JJ) (application in the context of an insolvency exclusion in a professional indemnity insurance policy); *Gold Coast City Council v Sunland Group Ltd* (2019) 1 QR 304; [2019] QCA 118 at [33]-[36] ; *Segelov v Ernst & Young Services Pty Ltd* (2015) 89 NSWLR 431; [2015] NSWCA 156 at [88] (per Gleeson JA); *Horsell International Pty Ltd v Divetwo* [2013] NSWCA 368 at [158] (per McColl JA, Beazley P concurring); *Black Box Control Pty Ltd v Terravision Pty Ltd* [2016] WASCA 219 at [42] (per Newnes and Murphy JJA, Beech J).

DEFERRED SALE PRICE

148. As earlier described, rather than the insured and Phoenix Global DMCC taking each of the steps described in the Master Murabaha Agreement and Purchase Agency Agreement in turn – Phoenix Global DMCC purchasing the commodities as the undisclosed agent of the insured followed by the insured offering to sell, and Phoenix Global DMCC agreeing to buy, the commodities – the parties executed documents which stated that each of these steps had been taken in the correct sequence and, having done so, the insured advanced the requested funds. This was not wholly at odds with the finance documents, which envisaged the purchase and on-sale of the Commodities in quick succession and perhaps by the exchange of documents. The insurer argued that, by reason of this – and the resulting non-compliance with Sharia principles – the Phoenix Group was not obliged to repay the funds. More specifically, there was no Cost Price and thus no Deferred Sale Price within the meaning of the Master Murabaha Agreement. As a consequence, it was said that there was no ***Advanced Payment*** within the meaning of the policy and no obligation to indemnify the insured.

149. Essentially, the same principles of construction apply to the commercial documents establishing the finance facility, as described at [135]-[147]. How the insured and the Phoenix Group implemented the transactions envisaged under finance documents must be put on one side when construing the documents. Post-contractual conduct does not assist on the question of what a contract means: *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153; [2001] NSWCA 61 at [25]-[26] . Where there is no doubt that a contract has been formed, it is not legitimate to use as an aid in construction of the contract anything the parties said or did after it was made: *Agricultural & Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at 582 (per Gummow, Hayne and Kiefel JJ), citing *Whitworth Street Estates v Miller* [1970] AC 583 at 603 (per Lord Reid). Rather, the Court interprets commercial contracts objectively "by what a reasonable businessperson would have understood [the] terms to mean": *Electricity Generation Corporation v Woodside Energy* at [35].

150. Turning to the terms of this particular commercial contract, clause 6 of the Master Murabaha Agreement concerned the Company's obligation to repay the funds advanced and provided: (emphasis added)

> **6 Deferred Sale Price Payments**
>
> **Payment of the Deferred Sale Price**
>
> 6.1 The relevant Company shall, *in respect of each Murabaha Contract entered into by it, be absolutely and irrevocably obliged to pay* the Value Date Sale Price Amount and *the Deferred Sale Price* on the relevant Payment Dates *as set out in the Offer Letter for the relevant Murabaha Contract*.

It will be recalled that Payment Date meant the Value Date and the Deferred Payment Date, being, in short, the date of entry into a Murabaha Contract and the date on which the monies advanced to the Company were to be repaid.

151. The obligation to pay the Deferred Sale Price arose “in respect of each Murabaha Contract entered into” by the Company. As to what a Murabaha Contract was, the term was defined as (clause 1.1):

> **Murabaha Contract** means a contract for sale between a Company and the Financier constituted by an Offer Letter and its Acceptance Notice pursuant to clause [5] (*Murabaha Contract*).
>
> **Offer Letter** means an offer from the Financier to the Company, substantially in the form set out in Schedule 3 (*Form of Offer Letter and Acceptance*).
>
> **Acceptance Notice** means an acceptance by the relevant Company of an Offer Letter, substantially in the form set out in Schedule 3 (*Form of Offer Letter and Acceptance*).

152. Importantly, as a defined term, Murabaha Contract was the product of the exchange of two contractually prescribed documents: the Offer Letter and its Acceptance Notice. The fact that this contractual product may not accord with Sharia principles does not have the consequence that it fails to be a Murabaha Contract for the purposes of the Master Murabaha Agreement between the insured and the Phoenix Group. As already described, an Offer Letter and Acceptance Notice were issued in respect of each Murabaha Request, with the consequence that there were eleven Murabaha Contracts between the insured and the Company within the meaning of the Master Murabaha Agreement.

153. What was the Deferred Sale Price? Clause 1.1 of the Master Murabaha Agreement contained the following definition:

> **Deferred Sale Price** means, in respect of each Murabaha Contract, the Sale Price minus the Value Date Sale Price Amount received by the Financier on the Value Date for that Murabaha Contract.

154. What was the Sale Price? According to clause 1.1:

> **Sale Price** means, in respect of each Murabaha Contract, the aggregate of:
>
> (a) Cost Price; and
>
> (b) Profit Amount

155. Cost Price was the amount charged by the Commodity Seller. More particularly, clause 1.1 provided:

> **Cost Price** means, in respect of a Murabaha Contract, the cost price … payable by the Financier (acting through the Purchase Agent) to the Commodity Seller for the purchase of the Commodities that are the subject of that Murabaha Contract.

> **Commodities** means pulses or grains of Australian origin that are Sharia compliant commodities (as determined by the Financier) ...
>
> **Commodity Seller** means any third party supplier approved by the Financier

It is not necessary to canvass the interstices of the definition of Profit Amount and the definitions embedded in that term.

156. As already described, the Cost Price was to be stated by the Company in the Murabaha Request, in which the Company also confirmed, represented and warranted *inter alia* that all "factual information provided by [the] Company ... was true and accurate in all material respects and not misleading." Here, the Phoenix Group provided a Purchase Contract with a Commodity Seller and Commercial Invoice rendered by the Commodity Seller, from which the Cost Price was drawn. The contractual regime permitted the Financier to rely on the Company's representations and proceed to advance funds without independent inquiry as to the veracity or authenticity of the proposed purchase.

157. Did it matter that the Purchase Contracts pre-dated the Purchase Agency Agreement or that the Purchase Contracts and Commercial Invoices indicated that the Company was purchasing these Commodities rather than the Financier? I do not think it matters for the purposes of the definition of Cost Price, which is just that: a definition of a *price*. It is not a definition of the particular contractual arrangements under which the price is to be paid, or by whom. The definition says nothing about the precise sequence of events which must unfold before the price is paid.

158. Nor does it matter that the Cost Price was based on sham documents. The Cost Price was stated by the Company in a Murabaha Request in which the Company warranted that the information was true and correct. The Master Murabaha Agreement established a procedure by which the Financier was entitled to rely on the contents of the Murabaha Request and advance funds accordingly. If the Company breached its obligations by giving false information, that does not mean that the Cost Price – or the Deferred Sale Price derived from it – disappeared along with the Company's obligation to repay the funds advanced on the basis of the false information. Construing the contract in this way would, with respect, make commercial nonsense or work commercial inconvenience where the Company could simply avoid its obligation to repay the funds advanced by providing false documents and information when requesting the funds: *Electricity Generation Corporation v Woodside Energy Ltd* .

159. Returning to the obligation to pay the Deferred Sale Price, the Offer Letter was to be "substantially in the form set out in Schedule 3", which required the Financier to state the Deferred Sale Price. The Company was "absolutely and irrevocably obliged to pay the ... Deferred Sale Price on the relevant Payment Dates *as set out in the Offer Letter* for the relevant Murabaha Contract": clause 6.1. As the insured submitted, the Offer Letter and Acceptance Notice were given contractual force and were the source of the obligation in clause 6.1. Here, the insured completed an Offer Letter in respect of each Murabaha Contract – stating the Deferred Sale Price – to which Phoenix Group executed an Acceptance Notice. That was the Deferred Sale Price in respect of each Murabaha Contract, which the Company was obliged to repay in accordance with clause 6.1.

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160. I do not construe the definition of Deferred Sale Price as containing a requirement that the parties strictly comply with the steps in clause 5 of the Master Murabaha Agreement. It is a definition and not a substantive provision; the definition identifies the price but does not impose substantive conditions before it is payable. Further, the construction pressed by the insurer is at odds with the whole of the Master Murabaha Agreement, including the Company's unconditional payment obligation in clause 7.9 to repay the funds advanced notwithstanding "*any defect in title to the … Commodities … or any other reason whatsoever*", the indemnity in clause 11, the undertaking in clause 14 and the partial invalidity clause 21.

161. The approach taken in *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd* [2004] 4 All ER 1072; [2004] 1 WLR 1784 has much to commend it. There, a bank and its customer entered into Murabaha agreements but, when the bank sought to recover the funds following the customer's default, the customer denied liability on the basis that the transactions were disguised loans at interest and unenforceable under Sharia principles. Potter LJ (Laws and Arden LJJ agreeing) held at [47]: (emphasis added)

> … neither side was under any illusion as to the commercial realities of the transaction, namely the provision by the bank of working capital on terms providing for long term repayment, and both were content "to dress the loan transactions up as Morabaha sales … whilst taking no interest in whether the proper formalities of such a sale … were actually complied with" … Nor … was it ever intended in relation to any of the agreements made that they should be other than binding on the parties. In those circumstances … *the Court, in approaching its task, should lean against a construction which would or might defeat the commercial purpose of the agreements.*

162. Here, of course, it is not a party to the finance documents which is contending that the funds advanced are not repayable by reason of non-compliance with Sharia principles, but a third-party insurer. (There is no evidence that the Phoenix Group regarded the Murabaha Contracts as anything other than binding.) But the same principle applies. Here, the commercial purposes of the finance documents was for the Financer to advance funds to the Company and be repaid regardless of any misrepresentation or fraud by the Company or the Company's failure to comply with Sharia principles. The insurer's construction of Deferred Sale Price would defeat this commercial purpose; the insurer's first argument fails.

THE POLICY

163. This brings us to the critical document. The policy was entitled "Trade Credit Insurance Policy" and comprised the policy wording, a Schedule and an "Information Package" containing the proposal and finance documentation, including the Guarantee and Indemnity, "Trade finance agreement viz Master Murabaha Agreement" and Purchase Agency Agreement.

164. Like the finance documents, the policy was complex and imperfect. The first feature to note is that there is no correlation between the defined terms in the policy and the defined terms in the finance documents. This does give rise to some constructional choices, to be resolved in accordance with the principles outlined at [135]-[141].

Insured Transaction

165. By the insuring clause, the insurer agreed to indemnify the insured for 90% of " ***Loss(es)*** caused by an ***Insured Risk*** in relation to the ***Insured Transaction*** ". Clause 4.21 defined the ***Insured Transaction*** as:

> The ***Insured's*** interest in a AUD 8,000,000 trade finance agreement, where the ***Insured*** disb urses funds to the ***Counterparty*** with a maximum repayment tenor of 120 days, based on invoices from third-party vendors.

The ***Counter-Party*** was either Phoenix Agrifoods or Phoenix Global DMCC, "which has entered into the ***Insured Transaction*** with the ***Insured*** ": clause 4.5; Item 7, the Schedule.

166. The definition of ***Insured Transaction*** echoed the description of the finance transaction outlined in the proposal, which formed part of the policy, and broadly described the trade finance provided by the insured to the Phoenix Group under the Master Murabaha Agreement and related documents.

Insured Risk

167. Clause 1.1 of the policy defined ***Insured Risk*** as:

> The failure or refusal of the ***Guarantor*** for any reason whatsoever to honour its ***Debt Obligation(s)*** in accordance with the terms and conditions of the ***Guarantee*** on the ***Due Date*** (including any obligations for repayments of ***Advance[d] Payment***) following any failure of the ***Counter-Party*** to honour its **Debt Obligation(s)**.

168. The definition is embedded with other defined terms, some of significant complexity and also containing embedded definitions. Obviously enough, the ***Guarantor*** was Phoenix Commodities and the ***Guarantee*** was the Guarantee and Indemnity executed on 13 February 2020. ***Due Date*** mea nt the date a ***Debt Obligation*** was required to be paid by the ***Counter-Party*** and/or the ***Guarantor*** to the insured under the terms of the ***Insured Transaction*** and/or the ***Guarantee*** : clause 4.9.

169. Clause 1.1 and clause 4.9 suggest that the ***Debt Obligation(s)*** of the ***Counter-Party*** and the ***Guarantor*** were not the same. This is confirmed by the definition of ***Debt Obligation(s)*** in clause 4.8, being:

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> Irrevocable obligations of the ***Counter-Party*** and/or the ***Guarantor*** to repay the unearned portion of the ***Advanced Payment*** in accordance with the terms and conditions of the ***Insure d Transaction*** and/or the ***Guarantee*** .

170. The parties agreed that the definition should be read distributively, that is, the irrevocable obligations of the ***Counter-Party*** depend upon the terms of the ***Insured Transaction*** while the irrevocable obligations of the ***Guarantor*** depend upon the terms and conditions of the ***Guarantee*** . In addition, it is apparent from the definition of ***Insured Risk*** that the ***Debt Obligation(s)*** of the ***Coun ter-Party*** and the ***Guarantor*** arose sequentially, with the ***Debt Obligation[s]*** of the ***Guarantor*** "*followi ng* any failure of the ***Counter-Party*** to honour its **Debt Obligation(s)**".

Advanced Payment

171. "Unearned portion" is not a defined term (either in the policy, the Guarantee and Indemnity or the Master Murabaha Agreement). ***Advanced Payment*** is defined in clause 4.1 as:

> The payment advanced to the ***Counter-Party*** by the ***Insured*** in accordance with the terms and conditions of the ***Insured Transaction*** in consideration for the future delivery of the ***Ins ured Goods*** to the ***Insured*** by the ***Counter-Party*** .

I take "the *unearned portion* of the ***Advanced Payment*** " to be reference to the funds advanced by the insured under the Master Murabaha Agreement and related documents, which the Counter-Party was not entitled to retain.

172. ***Insured Goods*** was defined as "*financing* the purchase of grains and pulses" in accordance with the terms and conditions of the ***Insured Transaction*** : clause 4.18; Item 17, the Schedule. Noteworthy, the ***Insured Goods*** were "*financing the purchase*" of commodities, not commodities. The insured suggested the definition "made no sense at all". Certainly, the definition does not sit well with the phrase – "the future delivery of the ***Insured Goods*** to the ***Insured*** by the ***Counter-Party*** " – where the insured was providing finance to the Counterparty and not the other way around.

173. An alternate construction is to read the definition of ***Insured Goods*** as a reference to the commodities, which does work with the definition of ***Advance Payment*** where – in one of the steps envisaged by the finance documents – the Company bought the commodities for the insured when actioning a Purchase Instruction. This construction, however, does not sit well with the underlying finance transaction, the purpose of which was that the insured would provide finance to the Company. Whilst an interim step in that process was that the Company would buy commodities 'for' the insured, it did so as the insured's agent; it was never envisaged that there would be a "future delivery of [the commodities] to the ***Insured*** by the ***Counter-Party*** ". I am also reluctant to ignore the clear and specific definition of ***Insured Goods*** so that another definition makes sense.

174. I prefer to read the words of the definition of ***Insured Goods*** into the definition of ***Advanced Payment*** and read the resulting definition of ***Advanced Payment*** in a manner consistent with the purpose of the policy: *Kelly v R* . The purpose of the policy was to insure against the risk that the funds advanced by the insured to its customer would not be repaid; it was perfectly clear that the insured was providing finance, not buying commodities. In any event, whether one uses the definition of ***Insured Goods*** as "*financing* the purchase of grains and pulses" or "grains and pulses", the meaning remains tolerably clear: the ***Advanced Payment*** were funds advanced by the insured to the Phoenix Group under the Master Murabaha Agreement and related documents.

175. The insurer submitted that "in accordance with the terms and conditions of the ***Insured Transaction*** " and "in consideration for the future delivery of the ***Insured Goods*** to the ***Insured*** by the ***Counter-Party "*** added two additional requirements which the insured must satisfy in order for a payment to be an ***Advanced Payment*** . The insurer submitted that the insured failed to purchase commodities from vendors and then on-sell the commodities to the Phoenix Group in accordance with the Master Murabaha Agreement. Rather, the Purchase Contracts were entered into *before* execution of the finance documents. As such, Phoenix Global DMCC did not enter into these contracts as the insured's agent, either disclosed or undisclosed. At best, the insured advanced funds to enable Phoenix Global DMCC to complete the purchase of commodities on its own behalf. Such an advance was said to be contrary to the terms and purpose of the Master Murabaha Agreement and to Sharia principles. Further, the funds were advanced *after* the insured executed the Letter of Offer and Acceptance and after Phoenix had executed a Purchase Confirmation, that is, after the insured stated that it had already acquired the commodities and after Phoenix had confirmed that it had already purchased the commodities on behalf of the insured. On the face of the documents, it was said that the funds were not advanced by the insured for the future delivery of goods to it. Nor was there any evidence that the Phoenix Group ever used the funds to purchase the commodities in question.

176. I do not agree that these phrases in the definition of ***Advanced Payment*** have the substantive effect contended for by the insurer. Clause 4.1 is a definition, not a substantive clause: see the principles at [145]-[147]. The purpose of clause 4.1 is to describe the payments contemplated by the Master Murabaha Agreement and related documents, not to impose a condition on cover, being *strict* compliance with the terms of the finance documents. Elsewhere – in substantive clauses – the policy deals with the insured's obligation to comply with the finance documents, laws and regulations and the effect of non-compliance on the insured's rights under the policy. Clause 2.3 excludes cover if there is "material default" causing ***Loss*** : see [184]. Conditions precedent in clause 3 address compliance with laws and regulations in detail: see [195], [198]. Requiring the insured to act "in accordance with the terms and conditions of the ***Insured Transaction*** " would operate as a broader exclusion, rendering these substantive clauses redundant.

177. Likewise, I do not consider that the phrase "in consideration for the future delivery of the ***Insured Goods*** to the ***Insured*** by the ***Counter-Party "*** is a substantive provision imposing an additional requirement on the insured before it is entitled to indemnity under the policy. The further difficulty with any such condition is that I consider it to be a reference to the delivery of *finance* rather than commodities: at [172]-[174]. The insurer's second argument fails.

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178. As such, I consider that ***Advanced Payment*** means funds advanced by the insured to the Phoenix Group under the Master Murabaha Agreement and related documents, while "the unearned portion of the ***Advanced Payment*** " is a reference to the portion of those funds which the Counter-Party is not entitled to retain.

Debt Obligation

179. It is necessary to consider the provisions of the Guarantee and Indemnity to identify the ***Debt Obligation*** of the ***Guarantor*** with precision, being the "irrevocable obligations of … [Phoenix Commodities] to repay the unearned portion of the ***Advanced Payment*** in accordance with the terms and conditions of … the ***Guarantee*** ". Noting the definition of ***Advanced Payment*** and the terms of the Guarantee and Indemnity (extracted at [54]), I consider that this meant Phoenix Commodities' obligation to pay on demand funds which the Counterparty was obliged to repay to the insured under the Master Murabaha Agreement and related documents. As the definition of ***I nsured Risk*** states, the ***Guarantor's Debt Obligation(s)*** *included* (and I interpolate, was not limited to) any obligations for repayments of ***Advance[d] Payment*** .

180. What then was the ***Debt Obligation*** of the ***Counter-Party*** , being "Irrevocable obligations of the ***Cou nter-Party*** … to repay the unearned portion of the ***Advanced Payment*** in accordance with the terms and conditions of the ***Insured Transaction*** ". As mentioned, I take "the unearned portion of the ***Adv anced Payment*** " to be a reference to the funds advanced by the insured under the Master Murabaha Agreement and related documents, which the Counter-Party was not entitled to retain.

181. The primary route by which the Counter-Party was obliged to repay the funds advanced by the insured was by payment of the Deferred Sale Price on the Deferred Payment Date. I have already concluded that, notwithstanding the manner in which the insured and Phoenix Group completed the Murabaha Contracts, the Phoenix Group was obliged to pay the Deferred Sale Price: see [148] -[162].

182. That was not the Counter-Party's only obligation to repay the funds. The Counter-Party was also obliged to repay the funds on the occurrence of an Event of Default, including if the representations or warranties given by the Counter-Party proved to be false, or to the extent that it was or became unlawful for the Company to perform any of its obligations under a Finance Document. The Counter-Party may also be obliged to repay the funds advanced under clause 7 in the event that it became unlawful for the insured to perform its obligations under the Master Murabaha Agreement or any Murabaha Contract. Similarly, the Counter-Party may also be obliged to repay the funds in the course of complying with its indemnity given in clause 11 of the Master Murabaha Agreement. The insured had a corresponding obligation to "use all reasonable efforts to ensure that *all rights* in respect of the ***Insured Transaction*** and the ***Guarantee*** relevant to a ***Loss*** or potential ***Loss*** are … exercised": clause 7.1(c).

183. The commercial circumstances which the policy addressed was the risk that the funds advanced by the insured to its customer would not be repaid in accordance with the customer's obligations.

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The object which the policy was intended to secure was that, in the event that the customer failed to comply with those obligations and repay the funds, the insured could look to the insurer to pay 90% of the funds advanced. The obligation insured was not limited to the customer's primary obligation but to all obligations under the finance documents.

Exclusions

184. Clause 2 of the policy contained exclusions. The burden of proving that an exclusion applies falls on the insurer: clause 7.2(2). In particular, clause 2.3 provided that the insurer was not liable to indemnify the insured for ***Loss*** "arising directly or indirectly" from:

> Material default by the ***Insured*** in the performance of its obligations under the ***Insured Transaction*** and/or ***the Guarantee*** (except such material default which arises as a result of the occurrence of an ***Insured Risk***) or the fraudulent, dishonest or criminal acts of the ***Insur ed*** .

185. Other exclusions list matters which may well cause the Counter-Party or Guarantor not to pay their Debt Obligations – a nuclear event, the insured's financial default or a bona fide dispute – but for which the insurer is not liable, presumably because the event causing loss was outside the risk inherent in the day-to-day operation of the trade finance arrangement or was something for which the insured was responsible. Similarly, in clause 2.3, if the insured was the cause of non-payment by reason of its default, then the insurer was not liable for the resulting ***Loss*** .

186. For the exclusion in clause 2.3 to apply, the default must be *material*. What amounts to a "material default" is not defined. Judicial consideration of these words assists and is consistent. "Material" requires that the matter "must be of moment or of significance, not merely trivial or inconsequential": *Minister for Immigration, Local Government and Ethnic Affairs v Dela Cruz* (1992) 34 FCR 348 at 352. When considering "material breach" in *Celtech International Ltd v Dalkia Utility Services plc* [2004] EWHC 193 (Ch), Richards J observed at [25] :

> The meaning of "material breach" must be derived from its contractual context, including the contractual consequences of such a breach. ... the focus is on the materiality of the breach, rather than the materiality of the obligation, and, as Colman J put it in *National Power plc v United Gas Co Ltd* (3 July 1998, unreported), a breach is material if it is:
>
> > "serious in the wide sense of having a serious effect on the benefit which the innocent party would otherwise derive from performance of the contract in accordance with its terms."

Celtech v Dalkia Utility Services was followed in *Elders Ltd v EJ Knight Co Pty Ltd* [2009] NSWSC 1462 (per White J) at [48]; *Androvitsenas v Members First Broker Network* [2013] VSCA 212 at [90]-[91] ; *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 28)* [2022] VSC 13 at [3662] (per Elliott J).

187. In *Waters Lane v Sweeney* [2007] NSWCA 200, Tobias JA considered "material breach" of heads of agreement and proceeded on the basis that for the breach to be material, it must be of particular

significance to the relevant party to the agreement: at [163]-[165] . In *Mobileciti Pty Ltd v Vodafone Pty Ltd* [2009] NSWSC 899, Hamilton AJ used dictionary definitions of "material": of substantial import or much consequence; of serious or substantial import. His Honour was there considering the meaning of "material representation" and followed *Waters Lane v Sweeney* in focussing on whether the representation was material to the party to whom the representation was made: at [60] .

188. In the contractual context of this policy, I consider that "Material default by the ***Insured*** in the performance of its obligations under the ***Insured Transaction "*** is a default in the insured's obligations under the Master Murabaha Agreement and related documents which has serious or substantial consequences for the insurer, being the relevant party under the policy. In the context of an insurance policy, such serious or substantial consequences must affect the ***Insured Risk*** by making a ***Loss*** more likely or of increased quantum.

189. I accept the insurer's submissions that the manner in which the insured performed its obligations under the Master Murabaha Agreement and related documents was not in strict conformity with those documents. Rather than the insured advancing funds to the Company to acquire the commodities and then on-selling the commodities to the Company for a Deferred Sale Price, the insured advanced the funds after entry into the Murabaha Contract. To that extent, the insured may be considered to have defaulted in the performance of its obligations under the ***Insured Transaction*** , albeit a default to which the Phoenix Group did not object and, indeed, embraced by joining with the insured in completing the steps prescribed by the finance documents in the manner proposed by the insured. The question is whether performing the insured's obligations under the ***Insured Transaction*** in this manner was a "material default" within the meaning of the policy. Three matters tell against such a conclusion.

190. First, as the policy is to be interpreted as at the date on which it was entered into and having regard to the context in which it was obtained, it is noteworthy that the change in the proposed finance from conventional finance to Sharia-compliant finance was not a matter of concern, nor of any significant interest to the insurer, when the policy was negotiated and issued. The insurer made only three (minor) amendments to the policy wording on learning that the finance would now be Sharia-compliant: see [13]. Nor did the insurer suggest any amendments to the finance documents. There is no evidence that the premium was affected by the Sharia-compliant nature of the proposed finance. Rather, the insured suggested that the change to Islamic finance presented the same risk profile and structure, with which the insurer did not demur: [13]- [14]. It appears that (presumably) the insured's customer requested that the finance be structured as Sharia-compliant, which request was accommodated by the insured but, as a feature of the proposed finance, appears to have been a detail of no great moment to the insurer. That is, the Sharia-complaint quality of the finance was a matter of importance to the customer but not to the insurer *per se*. As such, any non-compliance with the strict sequence of steps described in the Master Murabaha Agreement and related document in order to achieve Sharia-compliance was unlikely to be a "material" default from the insurer's perspective.

191. Second, it will be recalled that the proposal – which formed part of the policy – contained a description of "the structure of the payment obligation for which insurance is required": at [15]. The proposal described the steps involved in each drawdown differently from the finance documents, in particular:

> 3. Customer selects pulses and grain to be purchased from a third-party Vendor and arrange for the invoice and "Offer and Acceptance" to TAC to settle the purchase.
>
> 4. TAC agrees to purchase the product subject to "Offer and Acceptance" request and has received duly executed set of Murabaha contracts by the Customer.
>
> 5. *At this point TAC will disburse the loan proceeds to Customer for settlement.* The Customer will settle the payment to Vendor as Agent for TAC and undisclosed to the Vendor.

192. This was how the Financier and the Phoenix Group, in fact, proceeded to conduct themselves. This was disclosed to the insurer. It was no secret that the insured intended to advance funds in a manner other than described in the finance documents, which drew no comment from the insurer and thus may be thought to have been a matter which was not likely to be considered a "material default" by the insurer if that different procedure was followed.

193. Third, the insurer did not suggest that the manner in which the insured advanced funds made a ***Lo ss*** more likely or increased the quantum any ***Loss*** , nor is clear how the insured's suggested deficiencies in undertaking the steps prescribed by the Master Murahaba Agreement made any difference on this score. Whether the Purchase Contract pre-dated or post-dated the Master Murahaba Agreement made no difference to the insurer's risk, as I far as I can see. Nor did the fact that funds were advanced after the Purchase Instruction or after the Acceptance Notice.

194. What did make a difference to the insurer's risk was that the commodities did not in fact exist and the documents proffered by the Company in support of the drawdown request were shams. But clause 2.3 does not exclude indemnity in the event of the material default or the fraudulent, dishonest or criminal acts of the ***Counter-Party*** or ***Guarantor*** . This is consistent with a construction of the policy entitling the insured to indemnity for Loss arising from such an event. ***L oss*** caused by the material default or fraudulent, dishonest or criminal acts of the ***Counter-Party*** or ***Guarantor*** falls within the insuring clause.

Conditions precedent

195. Clause 3 of the policy specified conditions precedent to the insurer's liability; the burden of proving that all conditions precedent have been met falls upon the insured: clause 7.2(1). First, clause 3.1 provided:

> The following conditions are ***Conditions Precedent*** to ***Underwriters'*** liability in respect of the ***Loss*** .

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3.1 ***Enforceable Debt***

The ***Insured Transaction*** and/or the ***Guarantee*** and their related repayment obligations are legally valid and enforceable repayment obligations of the ***Counter-Party*** and/or the ***Guara ntor*** in accordance with the ***Transaction Governing Rules*** in force as at [7 February 2020].

196. Clause 4.27 defined ***Transaction Governing Rules*** as "the applicable laws that respectively govern the ***Insured Transaction*** and the ***Guarantee*** ...". As to the ***Insured Transaction*** , the Master Murabaha Agreement and Purchase Agency Agreement provided that the governing law was the law of New South Wales: clause 25.1, Master Murabaha Agreement; clause 13.1, Purchase Agency Agreement. Each Murabaha Request and Offer Letter and Acceptance contained a statement to the same effect and, likely, the Purchase Instruction and Purchase Confirmation also intended to do. As to the ***Guarantee*** , the governing law was the law of New South Wales: clause 25.

197. This condition precedent makes sense: why should the insurer pay a claim on the policy where the insured is not be entitled to enforce the insured transaction against the obligors? Were it otherwise, the insured would enjoy a windfall gain on being indemnified in respect of an unenforceable obligation. There was no suggestion that the law of New South Wales rendered the obligations of the Phoenix Group under the finance documents invalid or unenforceable.

198. Clause 3.4 provided an additional condition precedent on which the insurer places some weight: (emphasis added)

3.4 ***Compliance with Transaction Governing Rules***

The ***Insured*** shall comply with the *applicable material* laws and regulations pertaining to the ***Insured Transaction*** and/or the ***Guarantee*** that were in force at [7 February 2020] ... If compliance with any laws or regulations of the ***Counter-Party's Country*** [Australia for Phoenix Agrifoods and Dubai, UAE for Phoenix Global DMCC] and/or the ***Guarantor's Country*** [British Virgin Islands] would put the Insured in breach of the laws of the ***Insured' s Country*** [Australia] this obligation will not apply as regards the law or regulation in question.

199. Notably, clause 3.4 is concerned with *the insured's* compliance with "applicable material laws". So far as the Phoenix Group did not comply with such laws, that is no bar to the insured's entitlement to indemnity under the policy.

200. The insurer submitted, and I agree, that the insured's satisfaction of this condition precedent makes sense in light of clause 7.3, "Subrogation", which provided that, in the event of any payment of a ***Loss*** under the policy, the insurer was subrogated to the insured's rights of recovery "against any person or organisation ... The ***Insured*** shall do nothing to prejudice such rights." If, by non-compliance with the laws and regulations of Dubai, UAE, the insurer's ability to recover from Phoenix Global DMCC was compromised, then it makes sense that the insurer should not be obliged to indemnify the insured for a ***Loss*** which the insured would not be entitled to recover itself by reason of its own actions.

201. To determine whether the insured has complied with the condition precedent, it is necessary to consider what are the "applicable material laws" pertaining to the ***Insured Transaction*** and/or the ***Guarantee*** within the meaning of the policy. The insured submitted that "applicable material laws" were the laws of New South Wales, as the insured was in New South Wales and this was the law chosen by the policy and the finance documents. However, I consider that the fact that the clause proceeds to excuse the insured from complying with the laws of the UAE in certain circumstances rather suggests that the laws of the UAE may qualify as "applicable material laws". However, the finance documents make plain that, if either the insured or the insurer were to seek to enforce the insured's rights in the UAE, that enforcement action would be taken in "the courts of the Dubai International Financial Centre and courts of appeal from them": clause 25.2, Master Murabaha Agreement, extracted at [45]. It therefore becomes necessary to consider the laws to be applied by the DIFC.

202. In a case cited by Mr Khan, *Fal Oil Co v Sharjah Electricity and Water Authority* [2019] DIFC ENF 221, Martin J explained that the DIFC was created under Federal Laws authorising the creation of Financial Free Zones, such zones to be subject to all Federal Laws "with the exception of Federal civil and commercial laws": Article 3, Federal Law No 8 of 2004 regarding the Financial Free Zones (UAE). The lacuna created by this provision was filled by specific laws concerning the civil and commercial laws to be applied within the DIFC, together with a "waterfall" provision in Article 8(2) of DIFC Law No 3 of 2004 on the Application of Civil and Commercial Laws of the DIFC, which identifies the applicable law in a cascading matter as follows:

> (2) The relevant jurisdiction is to be the one first ascertained under the following paragraphs:
>
> > (a) so far as there is a regulatory content, the DIFC Law or any other law in force in the DIFC; failing which,
> >
> > (b) the law of any Jurisdiction other than that of the DIFC expressly chosen by any DIFC Law; failing which,
> >
> > (c) the laws of a Jurisdiction as agreed between all the relevant persons concerned in the matter; failing which,
> >
> > (d) the laws of any Jurisdiction which appears to the Court or Arbitrator to be the one most closely related to the facts of and the persons concerned in the matter; failing which,
> >
> > (e) the laws of England and Wales.

203. In light of these provisions, it is unsurprising that Mr Khan considered that the Courts of the DIFC would likely give effect to the intention of the parties and hold that any substantive questions of law should be determined under the law governing the contract, being the laws of New South Wales. That is, the Courts of the DIFC would consider whether, under the laws of New South Wales, the transactions were void as they did not conform with the requirements of the Master Murabaha Agreement and the Purchase Agency Agreement or AAOIFI Sharia

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Standard No 8 on Murabaha. As already noted, the insurer did not suggest that the law of New South Wales rendered the obligations of the Phoenix Group under the finance documents invalid or unenforceable.

204. Mr Khan did suggest an argument that could be advanced before the DIFC in support of the invalidity of the transactions under the Master Murabaha Agreement. In *YYY Ltd v ZZZ Ltd* [2017] DIFC ARB 005, Field J observed, "The conflicts of laws rules applied in DIFC Courts are founded in general on the English conflicts of laws rules which are authoritatively expounded in *Dicey, Morris & Collins*." *YYY Ltd v ZZZ* was cited in *Fal Oil v Sharjah Electricity and Water Authority* [2019] DIFC ENF 221 at [56]. Mr Khan referred to *Dicey and Morris on the Conflict of Laws* (10th ed, 1980, Stevens & Sons Limited) vol 2, 'rule 149', which states:

> The … validity of the contract is (subject to the Exceptions hereinafter mentioned) governed by the proper law of the contract.
>
> … [As to the Exceptions] The courts of all countries insist … on applying to a case otherwise governed by foreign law those principles of their own law which, in their own view, express basic ideas of public policy. [Citing Fry J in *Rousillon v Rousillon* [1880] 14 Ch D 351 at 359], "It appears to me, however, plain or in general principles that this court will not enforce a contract against the public policy of this country, wherever it may be made. It seems to me almost absurd to suppose that the courts of this country should enforce a contract which they consider to be against public policy, simply because it happens to have been made somewhere else."

205. As such, Mr Khan considered that it was possible for a party to argue that the Courts of the DIFC should hold the transactions void by reason of contravention of the public policy of the UAE without reference to the laws of New South Wales. The practical effect of such an approach would be to displace the operation of New South Wales law by the Courts of the DIFC in favour of UAE public policy. Mr Khan said that the public policy of the UAE was not defined under DIFC law and has a broad definition in Article 3 of the UAE Civil Code, which is not directly applicable in the DIFC, and states:

> Article 3
>
> Shall be considered of Public Policy, rules relating to personal status such as marriage, inheritance, descent, and rules concerning governance, freedom of commerce, trading in wealth, rules of personal property and provisions and foundations on which the society is based in a way that do not violate final decisions and major principles of Islamic Sharia.

206. Given the comparatively recent establishment of the Courts of the DIFC, Mr Khan noted that such arguments have yet to be considered by the Courts and there are no specific cases on point.

207. In a case referred to by Mr Khan, *Loralia Group LLC v Landen Saudi Co* [2018] DIFC ARB 004, a party sought to set aside an arbitral award on the basis that it conflicted with the public policy of the UAE against contingency fees, such fees being prohibited by UAE Federal Law. Justice Shamlan Al Sawalehi observed that public policy was uniform across the UAE but allowed for

differing outcomes where matters were rightly brought before the DIFC Courts rather than other UAE courts. His Honour explained at [37]:

> Public policy of the UAE encompasses the constitutional and legislative creation of the DIFC and thus incorporates the intended differences legally allowed within the DIFC.

208. Although the relevant UAE Federal Law was enacted before the establishment of the DIFC, Justice Shamlan Al Sawalehi held that it could not be said to "apply fully within the DIFC" as the DIFC Courts had a separate and incompatible system for registering legal practitioners and governing their conduct. Although the DIFC Courts' practice code stated that contingency fees were not considered best practice, nor were such fees prohibited. In short, "while UAE public policy may outlaw contingency fees outside of the DIFC, it does not do so within the DIFC": at [40] .

209. Returning to the policy, the insured's obligation was to comply with "*applicable material* laws and regulations pertaining to the ***Insured Transaction*** ". Mr Khan's expert opinion and the case law referred to establish that the law which the DIFC Courts will apply in enforcement proceedings will be determined in accordance with the laws of New South Wales. Having regard to the meaning of "material" as canvassed at [186]-[188], it is the law of New South Wales which is of moment or of significance, having serious or substantial import. Whilst an argument may be advanced that, notwithstanding the applicable law identified by Article 8(2) of DIFC Law No 3 of 2004 on the Application of Civil and Commercial Laws of the DIFC, UAE public policy requires the application of Sharia principles, I do not consider that this elevates UAE public policy to "applicable material laws". This is not to understate the importance of Islamic law or Sharia principles but simply to say that, under the terms of this policy, such law and principles were not *a pplicable material law*. The insurer's third argument fails.

CONCLUSION

210. Turning to the entitlement of the insured to call for repayment of the funds advanced to the Counterparty in this case, clause 15.11 of the Master Murabaha Agreement provided that an Event of Default included the appointment of a liquidator to the parent company. In that event, clause 15.22 provided:

> **Acceleration**
>
> 15.22 On and at any time after the occurrence of an Event of Default the Financier may by notice to the Companies:
>
> > …
> >
> > (b) declare that each Murabaha Contract shall be determined on the date specified by the Financier (**Early Termination Date**), whereupon the Deferred Sale Price (determined as though the final Deferred Sale Date is the Early Termination Date) for each outstanding Murabaha Contract and all other amounts accrued or outstanding under the Finance Documents shall become due and payable on such Early Termination Date:

(c) declare that all or part of any Deferred Sale Price be payable on demand, whereupon they shall immediately become payable on demand by the Financier; and/or

(d) exercise any or all of its rights, remedies, powers and discretions under the Security Documents.

211. As described at [113]-[115], an Event of Default occurred on 20 April 2020 when Phoenix Commodities was placed in liquidation; on 1 May 2020, the insured declared pursuant to clause 15.22(b) that each Murabaha Contract was terminated with immediate effect such that the Deferred Sale Price and all other amounts accrued or outstanding under the Finance Documents were immediately due and payable. As such, on the appointment of liquidators to the guarantor, the insured was entitled to, and did, call for repayment of the Deferred Sale Price on an Early Termination Date, such that the Deferred Sale Price (determined as though the final Deferred Sale Date was the Early Termination Date) for each Murabaha Contract was due and payable.

212. The Counterparty did not pay the Deferred Sale Price when called upon to do so; in the terms of the policy, the ***Counter-Party*** failed to honour its ***Debt Obligation(s)*** . The insured called upon the Guarantor to pay these amounts and it failed to do so. This falls within the definition of ***Insured Risk*** , being "The failure or refusal of the ***Guarantor*** for any reason whatsoever to honour its ***Debt Obligation(s)*** in accordance with the terms and conditions of the ***Guarantee*** on the ***Due Date*** (includ ing any obligations for repayments of ***Advance[d] Payment***) following any failure of the ***Counter-Party*** to honour its ***Debt Obligation(s)*** ."

213. The insured has established the conditions precedent in clause 3.4 as the *applicable material* laws and regulations pertaining to the ***Insured Transaction*** are the laws of New South Wales, with which the insured has complied. The insurer has not sought to establish any exclusions. Clause 4.22 of the policy defined ***Loss*** as:

> Means the ***Debt Obligation*** contractually owing to the ***Insured*** from the ***Guarantor*** in respect of the ***Guarantee*** which remains unpaid ...

214. The burden of proving that the ***Loss*** is covered by the policy falls upon the insured (clause 7.2(1)) and has been discharged. The quantum of **Loss** was agreed.

ORDERS

215. For these reasons, I made the following orders:

1. DECLARE that the plaintiff is entitled to be indemnified under the Trade Credit Insurance Policy in respect of the claim made on 6 May 2020 together with interest under section 57 of the *Insurance Contracts Act 1984* (Cth) from 31 May 2020.

2. Order the defendant to pay the plaintiff $7,224,043.04.

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3. Order the defendant to pay the plaintiff's costs of the proceedings.

4. Direct the parties to notify any errors or omissions within 14 days.

5. In the event that either party seeks to vary Order 3, direct:

    1. the party seeking a variation to provide any affidavits and submissions (limited to three pages) within 28 days;

    2. the other party to provide any affidavits and submissions in reply (limited to three pages) within 14 days of receipt of the material in Order 5 (a);

    3. such application to be determined on the papers.

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Amendments

31 May 2022 - 31 May 2022 - Changes to Word file formatting

Decision last updated: 31 May 2022

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