

The Aldwich Bond Programme: Duty Of Care & Debt Capital Markets

22 May 2026

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Corporate bond issuances in Malaysia operate through a network of professional advisers responsible for structuring, disclosure and post-issuance monitoring. The integrity of this framework depends not only on the issuer, but on the accuracy and completeness of information disseminated to investors. The decision in *Maybank Trustees Berhad (formerly known as Aseambankers Malaysia Bhd) v Amtrustee Bhd & Ors and other appeals* [2020] 4 MLJ 405 stands as one of the most consequential decisions in Malaysian capital market history, which clarifies the scope of duties owed by professional advisers like banks, trustees and auditors in a bond programme, and the legal consequences when each of them falls short.

Brief Facts

In 2003, waste management company, Aldwich Enviro-Management Sdn Bhd (AEM) raised RM877 million through bonds issued by its wholly-owned subsidiary, Aldwich Berhad (the Bond Programme), to finance a waste oil recovery plant. Kamalul Arifin Yusof was the substantial shareholder of AEM. Maybank Investment Bank Berhad (MIBB) assumed multiple roles as the adviser, lead arranger, security agent and primary subscriber. Maybank Trustees Berhad (MTB) acted as the trustee, while Ernst & Young (EY) served as the reporting accountant and auditor of Aldwich. At its inception, the Bond Programme received a triple-A rating by Rating Agency Malaysia Bhd (RAM).

The Bond Programme was structured for a tenure of 15 years but defaulted after 7 years, resulting in receivership and substantial losses to the bondholders. In 2012, a group of bondholders, comprising of, the Employees' Provident Fund, AmTrustee Berhad, AmNominees (Tempatan) Sdn Bhd, CIMB Bank Berhad, RHB Nominees Sdn Bhd, HSBC (Malaysia) Trustee Berhad and Uni

Asia Life Assurance Berhad, commenced a legal proceeding against AEM, Aldwich Berhad, Kamalul Arifin Yusof, MIBB, MTB and EY. The claims were brought, inter alia, in negligence and for breaches of contract and statutory duties under the Securities Commission Act 1993 (SCA).

The High Court found all defendants were liable and awarded damages of RM177,248,747.30 to the plaintiffs. The court distinguished between the primary wrongdoers, (the issuer and its controller), who had actively diverted funds and was found wholly liable for the losses. On the other hand, liability was apportioned at 50%, 30% and 20% among the respective advisers (MIBB, MTB and EY).

All defendants appealed, resulting in 9 appeals before the Court of Appeal. The court dismissed each appeal in its entirety and affirmed the High Court's findings, emphasising the respective duties of professional advisers in ensuring proper disclosure and compliance within a bond issuance framework.

The Document Investors Commonly Rely On For Bond Programme Information

It must be noted that typically, for the purpose of investor's information and assessment in a bond programme, investors are usually given Information Memorandum (IM). The IM contains representations of the issuer's financial health, its cashflows, its assets, the purpose of the bond proceeds, and the adequacy of security, which go to the very heart of the investor's investment decision.

In this case, the statements made in the documentation of the Bond Programme were held to have contained misrepresentations of facts upon which investors relied.

Obligations Of Each Professional Adviser In The Bond Programme

The Bond Programme case addressed the obligations of each stakeholder across two distinct phases of the bond's lifecycle: pre-issuance duties relating to the accuracy and completeness of the IM, and post-issuance monitoring obligations.

a) The Principal Adviser/Lead Arranger and Security Agent

At the pre-issuance stage, the principal adviser/lead arranger was required to ensure compliance with all conditions precedent (CPs), including the assignment of AEM's business contracts to Aldwich (Assignment), however the Assignment was never in fact executed. As a result, the terms of the Bond Programme were unilaterally varied, constituting a material change without disclosure to the Securities Commission (SC) or in the IM, thereby rendering the information in the IM false and misleading.

Further, at the post-issuance stage, in its capacity as security agent, the bank was responsible for ensuring that proceeds from the underlying business of Aldwich flowed through the prescribed revenue accounts and cascading "waterfall" structure designed to safeguard the bondholders of this Bond Programme. Given that it had control over the majority of the designated accounts and even acted as the sole

signatory of those designated accounts, the Court held that the bank was under a duty to ensure strict adherence to this structure.

The principal adviser/lead arranger sought to rely on a disclaimer clause which purported to absolve it from liability for any false or misleading statement or material omission in the IM. The Court of Appeal rejected this argument, holding that a disclaimer clause cannot exonerate a party from the consequences of its own deliberate acts and omissions, particularly where such exclusion would undermine statutory protection in the SCA.

b) The Trustee

As a fiduciary to the bondholders, the trustee owed a duty of care to actively safeguard the bondholders' interest by ensuring compliance with the trust deed and the bond structure. This duty required the trustee to verify that the issuer adhered to its obligations, monitor the movement of funds through the designated accounts, and promptly alert relevant parties in the event of any discrepancies.

In this case, the trustee failed to discharge these obligations. It proceeded on the assumption that the issuer had complied with the terms of the trust deed without undertaking any meaningful verification, especially, when it failed to detect the monies were not being channelled through the prescribed cascading "waterfall" structure. Not only that, the trustee also did not conduct adequate due diligence on the Bond Programme over an extended period of time. Numerous breaches were only reported to the SC after 6 years.

c) The Auditor/ Reporting Accountant/Financial Adviser

Under Section 38(3) of the SCA, the financial adviser/reporting accountant can be held liable for any false or misleading statements in the IM, as well as for material non-disclosures. In this case, the auditor undertook multiple roles within the Bond Programme, including valuing the issuer's business, certifying the issuer's long-term cash flow projections and participating in the Due Diligence Working Group (DDWG).

It also signed the verification report confirming the accuracy and completeness of the IM, thereby expressly endorsing its content for investor reliance. The court found that the valuation of the issuer's business was materially overstated and therefore, misleading, as it was based on speculative and unreliable cash flow projections provided by the issuer. Despite its role as an independent professional adviser, the auditor did not exercise adequate professional skepticism on the information provided by the issuer.

Moreover, even after becoming aware of material changes to the bond structure which undermined the intended ring-fencing of security, the auditor failed to disclose these developments to the SC, and this omission was found to be a breach of its

statutory duties under Section 38(3) and 32B(3) of the SCA, as well as its duties as a member of the verification committee.

Finally, the court also rejected the auditor's reliance on contractual disclaimers and "Important Notice" provisions in the IM. It held that such disclaimers could not exclude liability for statutory breaches or negligence, particularly where investors had no contractual privity with the auditor and were entitled to rely on its professional certification.

The Way Forward For Professional Advisers

a) Full & Frank Disclosure

The court was very clear, that full and frank disclosure is the bedrock principle as the SC relies on the accuracy and full disclosure of all contributors to the IM, and investors in turn, rely on that disclosure in making their decisions. This principle extends not only to what is stated in an IM, but to what is omitted.

b) The Limit of Disclaimer Clauses

The court also was equally firm on the invalidity of disclaimer clauses. By rejecting broad disclaimer clauses, the court has established a demanding framework of accountability and what defines as a responsible adviser.

c) The Role of Professional Advisers

The court decided that the failures were not isolated incidents but demonstrated a collective abdication of professional responsibility at every juncture of the bond's lifecycle. It is imperative to note that the bond issuance here collapsed not because of any failure of the underlying business, but because every safeguard or *red flag* was ignored from the very beginning. All in all, each adviser bears responsibilities that extend beyond its immediate contractual counterparty to all those who reasonably rely on its work.

This case serves as a cautionary tale and demonstrates that markets are not protected by attributing all blame to fraudsters. In fact, it is protected by ensuring that the advisers, like lead arrangers, trustees, and auditors to exercise their obligations throughout the transaction and not merely pointing fingers after the damage is done. As Malaysia's courts continue to navigate complex disputes particularly in bond matters, the framework laid down in this case remains as a foundational guide for all.

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