Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO MT1–24–2310 OF 2000

SURIYADI J

30 JUNE 2005

Land Law — Sale of land — Order for — Application for order — Islamic based facilities — 'Cause to the contrary' — Whether there exist cause to contrary — Whether Islamic based facilities in order — Whether there was want of information, as regards interest in supplementary affidavits — National Land Code 1965 ss 256 & 257

The plaintiff was a bank incorporated in Malaysia. The defendant was a company and the beneficial owner of a large tract of land ('the impugned land'). The impugned land was originally owned by a company ('the original owner'). Bya sale and purchase agreement, the defendant had bought the impugned land from the original owner. To part finance the acquisition of the impugned land, the defendant had requested a consortium of financial institutions ('the vendors'), with the plaintiff as the arranger and agent to help out. The assistance sought for was Islamic based facilities. The defendant effected a first charge over the impugned land. The defendant subsequently effected another charge also in respect of the impugned land. The defendant defaulted in instalment payment under the facilities. The plaintiff had prayed for an order, amongst others whereby the impugned land be subject to a public auction pursuant to ss 256 and 257 of the National Land Code 1965 ('NLC') to satisfy the sum due. Itwas contended by the defendant that the order sought by the plaintiff must fail as there exists issues or facts that may be construed as 'causes to the contrary'.

Held:

(1) Any transacted Islamic banking business must be presumed to be in order at the outset unless rebutted later. At its inception, so long as the bank genuinely adhered to the very fundamentals of the al-Quran and authentic ahadith, ie the exact demands of the religion of Islam, and the papers on the face of it were in order, that bank may proceed with the relevant banking transaction (see para 16).

(2) The papers of the plaintiff were in order in relation to the prerequisites of the contract. All the participating parties had agreed to the type of contract, ie Islamic based, the type and number of facilities, the amount, the mode of payment, period of payment, the profit margin of the plaintiff, the format of the securities, and all the other necessary details (see para 40).

(3) As imprinted clearly on the contractual documents between the defendant and the vendors pertaining to the impugned land, the plaintiff had actually acted as the agent of the vendors. Both the first and second charges, apart from the plaintiff acting as an agent of the vendors, they were also created in its favour. Thus, the plaintiff had the *locus standi* to initiate the proceedings emanated from the charges created in its favour (see para 46).

(4) The want of information, as regards the interest in the supplementary affidavits, did not mean that there was non-compliance of O 83 r 3(c) of the Rules of the High Court 1980. Bearing in mind that this was a non-bearing interest transaction, and the court have not directed the impossible ie for the plaintiff to particularise the interest, but the instalment in arrears at the date of issue of the originating summons, and at the date of the 'last amount due' affidavit were sufficiently supplied, the papers thus were in order (see para 55).

(5) So long as the correct amount was before the court at the final hearing, then the court may dispense with certain minor omissions or errors that do not fall under the category of 'cause to the contrary'. As the sum had remained unchanged, with the error being temporary and merely procedural in nature, let alone the defendant was never prejudiced by those botched references, the court will be unable to agree that this factor sufficed to qualify as 'cause to the contrary' (see para 57).

[**Bahasa Malaysia summary**

Plaintif adalah sebuah bank yang ditubuhkan di Malaysia. Defendan adalah sebuah syarikat dan juga merupakan pemilik benefisial sebidang tanah yang luas ('tanah tersebut'). Tanah tersebut pada asalnya dimiliki oleh sebuah syarikat ('pemilik asal'). Melalui satu perjanjian jualbeli, defendan telah membeli tanah tersebut dari pemilik asal. Untuk membiayai sebahagian dari pembelian tanah tersebut, defendan telah memohon dari satu konsortium institusi-institusi kewangan ('penjual-penjual'), dengan plaintif sebagai pengatur dan ejen untuk bantuan. Bantuan yang dipohon adalah kemudahan perbankan Islam. Defendan membuat gadaian pertama ke atas tanah tersebut. Defendan kemudiannya membuat satu gadaian lain juga ke atas tanah tersebut. Defendan ingkar membuat bayaran ansuran di bawah kemudahan tersebut. Plaintif memohon untuk satu perintah yang antara lainnya tanah tersebut dilelong secara lelongan awam dibawah ss 256 dan 257 Kanun Tanah Negara 1965 ('KTN') untuk melunaskan jumlah yang kenabayar. Defendan mengatakan bahawa perintah yang dipohon oleh plaintif tidak wajar diberikan kerana terdapat isu-isu atau fakta-fakta yang boleh ditafsirkan sebagai 'sebab-sebab yang bertentangan'.

Diputuskan:

(1) Sebarang transaksi perbankan Islam hendaklah dianggap teratur pada permulaannya sehinggalah ianya disangkal kemudiannya. Pada permulaannya, asalkan bank tersebut benar-benar mengikuti asas-asas al-Quran dan hadith asli iaitu tuntutan agama Islam yang sebenar, dan dokumen-dokumen pada zahirnya adalah teratur, bank tersebut boleh meneruskan dengan transaksi perbankan itu (lihat perenggan 16).

(2) Dokumen-dokumen plaintif adalah teratur mengikut prasyarat kontrak tersebut. Semua pihak yang terlibat telah bersetuju dengan jenis kontrak iaitu berdasarkan prinsip Islam, jenis kemudahan, jumlah, cara pembayaran, jangkamasa bayaran, margin keuntungan plaintif, bentuk jaminan, dan semua butir-butir yang perlu (lihat perenggan 40).

(3) Sebagaimana yang jelas tercetak pada dokumen-dokumen kontrak diantara defendan dan penjual-penjual berkenaan dengan tanah tersebut, plaintif telah bertindak sebagai ejen kepada penjual-penjual. Kedua-dua gadaian pertama dan kedua, melainkan dari plaintif bertindak sebagai ejen kepada penjual-penjual, ia juga dibuat memihak kepadanya. Oleh yang demikian, plaintif mempunyai *locus standi* untuk memulakan prosiding yang berpunca dari gadaian-gadaian yang dibuat memihak kepadanya (lihat perenggan 46).

(4) Ketiadaan informasi berhubung dengan faedah di dalam afidavit tambahan, bukan bermakna terdapatnya ketidakpatuhan A 83 k 3(c) Kaedah-Kaedah Mahkamah Tinggi 1980. Perlu diingatkan yang ini merupakan satu transaksi tanpa faedah, dan mahkamah tidak memerintahkan yang mustahil iaitu bagi plaintif untuk memberi butiran faedah, tetapi tunggakan ansuran pada tarikh keluaran saman permula, dan pada tarikh 'jumlah kena bayar yang terakhir', afidavit telah dikemukan secukupnya maka suratcara-suratcara adalah teratur (lihat perenggan 55).

(5) Asalkan jumlah yang betul dikemukakan ke Mahkamah pada perbicaraan, maka mahkamah boleh mengabaikan peninggalan-peninggalan kecil atau kesilapan-kesilapan yang tidak tergolong dalam kategori 'sebab-sebab yang bertentangan'. Memandangkan jumlah tersebut tidak berubah, dengan kesilapan yang sementara dan hanyalah berbentuk prosedur, defendan juga tidak diprejudiskan langsung oleh rujukan-rujukan yang silap itu, mahkamah tidak dapat bersetuju yang faktor-faktor ini mencukupi syarat untuk menjadi 'sebab-sebab yang bertentangan' (lihat perenggan 57).]

Notes

For cases on order for sale of land, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3582–3673.

Cases referred to

Bangkok Bank Ltd v Cheng Lip Kwong [1990] 2 MLJ 5 (refd)
BIMB v Adnan bin Omar [1994] 3 AMR 2291 (refd)
Bray v Ford [1896] AC 51 (refd)
Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363 (refd)
Citibank NA v Ibrahim bin Othman [1994] 1 MLJ 608 (refd)
Dato' Haji Nik Mahmud v Bank Islam Malaysia Bhd [1998] 3 MLJ 393 (refd)
Horace Brenton Kelly v Margot Cooper & Anor [1993] AC 205 (refd)
Keng Soon Finance Bhd v MFC Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457 (refd)
Kho Ah Soon v Duniaga Sdn Bhd [1996] 2 MLJ 181 (refd)
Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 7 (refd)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (refd)
Newacres Sdn Bhd v Sri Alam Sdn Bhd [2000] 2 MLJ 353 (refd)
Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd [1987] 2 MLJ 192 (refd)

Legislation referred to

Banking and Financial Institutions Act 1989
Central Bank of Malaysia (Amendment) Act 2003 s 16B, (8), (9)(a),
Companies Act 1965
Contracts Act 1950 s 24
Evidence Act 1950 s 114(e)
Islamic Banking Act 1983
National Land Code ss 254, 256, (1), (3), 257, 259(2)(a)
Rules of the High Court 1980 O 83, r 3(3)(c), (d)

Padzilah bte Pilus (Adnan Sundra & Low) for the plaintiff.
VK Lingam (VK Lingam & Co) for the defendant.

Suriyadi J:

[1] The plaintiff is a bank incorporated in Malaysia under the Companies Act 1965 and licensed under the Banking and Financial Institutions Act 1989. The defendant is also a company and the beneficial owner of a large tract of land (hereinafter referred to as the 'impugned land'). The facts as gauged from the writs, exhibited statement of claims and supporting affidavits have highlighted that the impugned land was originally owned by a company called Ng Eng Hiam Plantations Sdn Bhd (hereinafter referred to as the original owner). By a sale and purchase agreement dated 15 June 1995 the defendant had bought the impugned land from the latter.

[2] To part finance the acquisition of the impugned land, the defendant had requested a consortium of financial institutions (hereinafter referred to as the Vendors), with the plaintiff as the arranger and agent to help out. The assistance sought for was for an Al-Bai Blthaman Ajil facility with a sale price of

RM216,687,000, in aggregate made up of a purchase price of KM125,000,000, and a profit element over the impugned land.

[3] The antecedent and matrix of the case showed that for the Al-Bai Bithaman Ajil facility to be effective, a few agreements were executed on 29March 1996 between the defendant, the plaintiff and the vendors. On that date, first a Novation Agreement was executed between the plaintiff and the defendant, whereby certain rights and obligations between the original seller and the defendant under their S&P were novated to the vendors or to the plaintiff, as the case may be, on behalf of the vendors. Secondly, an Instalment Sale Agreement (Al-Bai Facility) was executed between the defendant and the vendors, whereby essentially the defendant agreed to purchase from the vendors the impugned land, by then already transferred to them by the original owners pursuant to the said Novation Agreement. According to the provisions of the Instalment Sale Agreement, the defendant became liable to pay to the plaintiff, for the account of the vendors, the sale price of RM216,875,000 for the land comprising a purchase price of RM125,000,000 and a profit element.

[4] Under this Instalment Sale Agreement, the defendant had to make regular instalment payments of RM3,281,250 on every defined date. It was also a term that, if there was a failure of payment then the plaintiff may, amongst others declare the unpaid sale price to be immediately due and payable, and declare the total purchase price commitment to cease. I must categorically state that all the steps, as explained above, and as expected of any normal Al-Bai Bithaman Ajil facility, had been adhered to strictly by the current plaintiff.

[5] As mentioned above, also on 29 March 1996 an Al-Wujuh Agreement was executed between the defendant and the vendors. This agreement was to provide the defendant a revolving Al-Wujuh facility comprising:

(a) an Al-Bai Bitaman Ajil facility (hereinafter called the Al-Bai facility); and

(b) revolving drawing rights on an account maintained by the plaintiff as part agent of the Vendors in relation to the revolving Al-Wujuh Facility (hereinafter called the Marginal Deposit Account with a maximum facility of RM60,000,000) on the terms and conditions set out in the Al-Wujuh Agreement.

[6] Pursuant to the Al-Wujuh Agreement, the vendors granted to the defendant the Al-Bai facility involving first, a purchase of the impugned land by the vendors from the defendant for a purchase price of RM60,000,000 for the land, and immediately after the transfer of the title of the land to the vendors, a resale of the land by the vendors to the defendant to take place, at the sale price payable by the defendant.

[7] In accordance with the Al-Wujuh Agreement the defendant, *inter alia* was also to pay the sale price in instalments, payable on each instalment date

and subject to revised payable instalment. amounts. As regards the Marginal Deposit Account, and pursuant to the repayment provisions of the revolving Al-Wujuh facility, each drawing was repayable in full on the instalment repayable date. Further, in the event of any defaults in payment, the vendors shall by written notice to the defendant declare the unpaid sale price and all drawings to be immediately due and repayable. Thereupon the Al-Wujuh Agreement shall cease to exist. It was also a term that the plaintiff and the vendors would be indemnified against all liabilities.

[8] Simultaneously on the same date, ie 29 March 1996, the defendant had effected a first charge, connected to the Instalment Sale Agreement over the impugned land. That first charge was registered on 25 April 1996 vide presentation No 18443/96 Jilid 31 Folio 7. On that date too the defendant had effected another charge, ie the second charge, also in respect of the impugned land vide presentation No 18444/96 Jilid 31 Folio 8, in favour of the plaintiff. The second charge was in relation to the Al-Wujuh Agreement with the conditions and stipulations being quite similar to the first charge. In brief, for both charges, if payments of the purchase of the impugned land were not made within the stipulated time, notices would be issued to the defendant and consequences would ensue, in the like of the cancellation of the relevant facilities, and with the unpaid sale price and drawings immediately be due and payable.

[9] By 22 January 1998 the defendant had indeed defaulted in an instalment payment, precipitating' a default pursuant to the Instalment Sale Agreement, the Novation Agreement and the remaining transaction documents (as defined in the Agreement). A demand was subsequently made vide a letter dated 26February 1998, to pay up the defaulted instalment due on 22 January 1998, in default of which, inter alia, the payment of the unpaid sale price would be accelerated pursuant to the default provisions. Unfortunately none was forthcoming. Vide a letter dated 10 March 1998, the plaintiff declared the unpaid sale price and all the drawings to be immediately due and payable. Further, and pursuant to that letter, the plaintiff demanded from the defendant the payment of all amounts due and payable to the vendors and cancelled the total purchase price commitment pursuant to the Instalment Sale Agreement. A reiteration took place when the plaintiff vide a letter dated 16 April 1998 recalled the unpaid sale price, and cancelled the facility and simultaneously demanded payment from the defendant the sum of RM197,187,500. That sum has yet to be paid except for RM 12,027,563 paid on 28 March 2001 thus leaving a balance of RM185,159,937 (encl 18).

[10] Pursuant to the first charge, the plaintiff had thereafter caused a letter of demand dated 27 March 2000 to be sent, demanding within one month the above original RM197,187,500. As nothing was forthcoming, the plaintiff had subsequently filed the current originating summons. Through this originating summons the plaintiff had prayed for an order, amongst others whereby the impugned land be subject to a public auction pursuant to ss 256 and 257 of

the National Land Code 1965 to satisfy the sum due to the chargee. To reiterate until now no payment has been made.

[11] Like a mirror image, and pursuant to the Al-Wujuh Agreement, by 16January 1998 the defendant had defaulted in the instalment payment of RM351,711.88 due on the instalment payment date, triggering a default pursuant to the said Al-Wujuh Agreement, and also the remaining Transaction Documents (as defined in the Agreement). A demand was subsequently made vide a letter dated 26 February 1998 to pay the instalment due on 16 January 1998 in default of which, *inter alia*, the payment of the unpaid sale price would be accelerated. Unfortunately no payment was made. Vide a letter dated 10 March 1998, the plaintiff declared the unpaid sale price and all the drawings to be immediately due and payable, and thereupon cancelled both the purchase price and the drawing rights on the Marginal Deposit Account, As per the letter of 10 March 1998, the plaintiff further demanded from the defendant the payment of all amounts due and payable from the vendors, under that Al-Wujuh facility. It was reiterated vide a letter dated 16 April 1998, that the unpaid sale price was recalled, with the revolving Al-Wujuh facility cancelled, and the utilised sum of RM47,920,726.52 be immediately paid up. The defendant has failed to do that too except a sum of RM2,972,437 also paid on 28 March 2001.

[12] Following that, and to effect the rights in the second charge, the plaintiff had thereafter caused a letter of demand dated 27 March 2000 to be sent, demanding within one month the above original amount of RM47,920,726.52. As nothing was forthcoming, the plaintiff had subsequently filed the current originating summons which covered both the charges. In brief, the plaintiff had also wanted the impugned land be subject to a public auction pursuant to ss 256 and 257 of the National Land Code 1965.

[13] This case involves the marriage of two distinctly diverse worlds, namely the Islamic world and the common-law sourced civil law, both protected and enabled by the Federal Constitution. The agreements here have Islam as their foundation whilst the foreclosure proceedings come under the civil law jurisdiction, specifically the National Land Code 1965 and the Rules of the High Court 1980.

[14] The Islamic banking system, currently co-existing with the civil banking system in Malaysia, is the extraction of the essence of Islamic Jurisprudence or Syariah, sourcing from the al-Quran and Al-Sunnah/ahadith and is here to stay. These two sources are the only God sanctioned sources in Islam. Despite all the unknown fears, bits and pieces have been picked up and pieced together, and finally seeing a wholesome and identifiable Islamic banking system molded from these two sublime sources. It saw statutory reality with the promulgation of the Islamic Banking Act 1983, primarily to provide for the setting up and licensing of Islamic banks, falling within the jurisdiction of the civil law and applying the civil court procedures (*BIMB v Adnan bin Omar* [1994] 3 AMR 2291;

Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd [1987] 2 MLJ 192; *Dato' Haji Nik Mahmud v Bank Islam Malaysia Bhd* [1998] 3 MLJ 393).

[15] This Islamic Banking Act contains very little of the law relating to Islamic banking, though the latter is defined as 'any company which carries on Islamic banking business and holds a valid licence...'. Islamic banking business is 'banking business whose aims and operations do not involve any element which is not approved by the religion of Islam'. Even though Parliament has approached the definition from a negative stand point, in the simplest of construction, Islamic banking business has to be a licensed banking business whose aims and operations are Islamic. Anything outside it is not Islamic banking business. Even though 'banking business' is not defined, BAFIA (Act 276) defines it to mean:

(a) the business of:

(i) receiving deposits on current account, deposit account, savings account or other similar account;

(ii) paying or collecting cheques drawn or paid in by customers; and

(iii) provision of finance;

(b) such other business as the bank (Bank Negara), with the approval of the minister, may prescribe.

[16] As it is now, despite being hampered by the paucity of adequate precedents and authority, it is my considered opinion that any transacted Islamic banking business must be presumed to be in order at the outset unless rebutted later (see s 114(e) of the Evidence Act 1950). At its inception, so long as the bank genuinely adheres to the very fundamentals of the al-Quran and authentic ahadith, ie the exact demands of the religion of Islam, and the papers on the face of it are in order, that bank may proceed with the relevant banking transaction. Any slip-shod preparatory work by the bank merely makes the rebuttal easier.

[17] In the event any litigation is commenced, it must be appreciated that not every presiding judge is a Muslim, and even if so, may not be sufficiently equipped to deal with matters, which ulamaks take years to comprehend. Grounded on those reasons, and by the manner of the provisions so enacted any court must accept the matter as being in order at first instance, until challenged. By analogy, in any foreclosure case, if the cause papers are in order, unless there is cause to the contrary as contended by the charger, the order must be given.

[18] The rebuttal, when a challenge for purposes of the current case crops up, *inter alia* may come in the form of a statement of disapproval from the in-house Syariah Advisory Body, as set up by the bank. Under the Central Bank of Malaysia (Amendment) Act 2003 (Act A1213) new provision of 16B(8), where

in any proceedings relating to Islamic banking business etc before any court or arbitrator, any question that arises concerning a Syariah matter, the court may refer such question to the Syariah Advisory Council. The court thus may even refer the matter to that body in the midst of any proceedings.

[19] In light of the existence of the branches of Sunni and Shia worldwide, with the former comprising no less than four Mazhabs/sects, what is, and what is not approved by the religion of Islam in relation to the banking business have occasioned the raising of many thorny questions. In practical terms or pragmatic purposes, the existence of those branches and sects cannot be denied. Each equally believes in the righteousness of its principles and belief, perhaps much to the annoyance of the opposing splintered group. For purposes of the matter before me, to lay too much emphasis on semantics and the like, may possibly spell the death knell of the Islamic banking system.

[20] The Malaysian definition as supplied above, speaks of 'religion of Islam'. It does not speak of a Malaysian oriented religion of Islam, Islam practised by a particular branch in the Muslim world or Mazhab or words to that effect, but simply religion of Islam. That being so it must be in the original format as revealed through Prophet Muhammad ordained by Allah, before the birth of the sectarian groups. The al-Quran has clearly injuncted that the only source of guidance is what has been laid down in it, as revealed by Allah through Prophet Muhammad, and the authentic ahadith (traditions and actions of the prophet; al-Quran V 5:49; V 7:3; V 59:7).

[21] The al-Quran as a source is not a problem, as it has remained unchanged since its revelation, and no Muslim of whatever sect will suggest otherwise. The problem is the al-Sunnah. This collection of traditions, sayings and actions has had its fair share of controversy, in the like of their acceptance by branches of followers (sects), generally termed as Mazhabs. The major ones are the Hanafi, Maliki, Shafie, and Hambali.

[22] To some, hereinafter referred to as purists or fundamentalists, a word made respectable by the former Malaysian Prime Minister, to even accede to the Mazhab's concept is per se blasphemous, as in the eyes of Islam they would have committed sin, for having divided the religion of Islam into different sects (Al-Quran 6: 159). Without wanting to stir any hornet's nest, during the life time of Prophet Muhammad, these Mazhabs never existed and Islam as propagated by him was the solitary sect. As far as any purist is concerned only the Mazhab of Muhammad existed then. The sects that came after him were never revealed through him by the Almighty, and surely if He had wanted it sanctioned He would have revealed it through the prophet. His .prophecy of his followers splitting up into 73 sects, with only one acceptable group religiously adhering to his sublime teachings, has given further ammunition to these purists.

[23] With the procreation of these sects, came the predictable different interpretations of the abovementioned two sources. Certain sects, apart from

giving different interpretations have created further discord, by challenging even the very existence and authenticity of some of the ahadiths. Surely all these differences do not augur well for the ordinary Muslim on the road, especially the non-Arabic speaking Muslim populace. These are only a few of the headaches faced by the legislators and propagators of the Islamic banking system.

[24] With Allah at V 5:3 having said that He had perfected the Islamic religion as chosen by him (see also Bukhari and Muslim), and all Muslims must only refer to the Al-Quran and the ahadith, it takes a brave and perhaps suicidal Government to codify and create another competitive source of reference for consideration. Perhaps that is the main reason why an Act in the like of the Contracts Act 1950, but catering to Islamic prerequisites has yet to see the daylight of a successful legislation.

[25] With the above mind boggling minefield awaiting lawyers and judges alike it is small wonder that the Syariah Advisory Body has been mandated to be formulated. It is when rulings are required that the latter body must give its opinion. Under the above new s 16B of Act A1213, the Syariah Advisory Body appears to have a rather wide scope of referral, and not merely confined to the issue of whether the matter at hand involves any element which is not approved by the religion of Islam. Needless to say the final say must rest with the presiding judge (see s 16B(9)(a)).

[26] Typical of cases of this nature, the defendant here has ventilated that the impugned contracts cannot be enforced on several grounds, *inter alia* it being tainted by interest or riba. It canvassed that this originating summons must fail as there exists issues or facts that may be construed as 'causes to the contrary'. The burden is on the defence to show that 'cause to the contrary', and invariably discharged by filing the relevant affidavits. Needless to say, ifthe defendant can successfully establish that there exists fatal procedural defects, deceit, bribery, un-Islamic practices in the like of usury, amongst others, having tainted the transaction then the originating summons must fail. The plaintiff's application is under ss 256 and 257 of the National Land Code, which respectively read:

256 Application to court for order for sale

(1) This section applies to land held under:

(a) Registry title;

(b) The form of qualified title corresponding to Registry title; or

(c) Subsidiary tile,

and to the whole of any divided share in, or any lease of, any such land.

(2) Any application for an order for sale under this chapter by a chargee of any such land or lease shall be made to the court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure;

(3) On any such application, the court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

257 Matters to be dealt with by order for sale

(1) Every order for sale made by the court under s 256 shall:

(a) provide for the sale to be by public auction;

(b) require the sale to be held on, or as soon as may be after, a date specified therein, being a date not less than one month after the date on which the order is made;

(c) specify the total amount due to the chargee at the date on which the date on which the order is made; and

(d) require the registrar of the court to fix a reserve price for the purpose of the sale, being a price equal to the estimated market value of the land or lease in question.

(2) Any such order may contain such other directions with respect to the sale as the court may think fit, and in particular (but without prejudice to the generality of the foregoing) may, where the charge in question relates to more lands or leases than one, direct:

(a) that they be offered for sale individually, and in a specified order; and

(b) that, in the event of the price fetched by one or more of them exceeding an amount specified in the order, or to be determined by the registrar of the court, the other or others shall be withdrawn from the sale, and shall cease to be subject to the order.

(3) In specifying or determining any amount for the purposes of paragraph (b) of sub-section (2), the court or the registrar, as the case may be, shall have regard, but also to any liabilities which (under section 268) will fall to be discharged out of the proceeds of sale in priority thereto.

[27] The defendant in its submission has canvassed a few causes, in the hope that one may fall under 'cause to the contrary' and they are, amongst others:

GROUND A

[28] The charges created under the Al-Bai Facility and the Al-Wujuh Facility are illegal, null and void, and as such are unenforceable.

(1) The defendant has alleged that the current Al-Wujuh Facility was a loan agreement with fixed interest rate payable by the defendant and not a sale's agreement. Likewise that Al-Bai Facility had the same fatal flaws. The very fact that the properties were charged accentuated and confirmed that loan status;

(2) by deducting eg RM60,000,000 from the gross sum of RM96,225,000 and the splitting up of the so-called gains by 84 months (made up of the duration of seven years multiplied

by 12 months), the interest sum and percentage could be arrived at. This same formula and fatal effect is equally applicable to the Al-Bai Facility;

(3) the agreements were against public policy as they had deceived the public. They being immoral or opposed to public policy as provided for under s 24 of the Contract Act 1950, were therefore unlawful and void; and

(4) with the agreements and facilities being illegal, null and void the first and second charges were therefore void.

GROUND B

[29] The statement of accounts, in all the plaintiff's affidavit in support, were calculated based on the summary judgments of civil suits D6–22–2801 of 1998 and D6–22–2800 of 1998 dated 31 October 2000, and set aside by the High Court on 24 October 2001.This was a fundamental flaw and therefore the originating summons ought to be dismissed.

GROUND C

[30] Sums not lawfully due to the plaintiff have been included in the Statement of Accounts, in the like of Including unlawful or erroneous auction and valuation fees for certain parcels of Land Office Titles, which are not covered by s 256(1) of the NLC and this charge action (*Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77).

GROUND D

[31] There was no evidence of any debt statement of accounts/certificate produced by the plaintiff to substantiate its claim. The non-production had caused serious injustice and detriment to the defendant.

GROUND E

[32] A further complaint was that, in a contract of al-Bai Bithaman Ajil, a bank will provide facilities for muqassah (rebate) for any customer who prepays. In this case the defendant is deprived of the rebate with the cancellation of the facility (*Halsbury's Laws of Malaysia* (Vol 14) MLJ at 299).

GROUND F

[33] The plaintiff was the agent of the vendors and therefore not a lender (to use the defendant's words). If the plaintiff was merely an agent it thus had no locus to initiate this application. Whether it is an agent can only be determined at the full trial (*Kho Ah Soon v Duniaga Sdn Bhd* [1996] 2 MLJ 181).

GROUND G

[34] The indemnity clause was too wide, ambiguous and not particularised. The damages sought were unquantified and unascertained and thus prejudicial to the defendant.

GROUND H

[35] The plaintiff by being the arranger, vendor and an agent for the vendors, gave rise to a serious conflict of interests, which offends all notions of equity and justice, when it has also prayed that it be at liberty to bid at the public auction without having to pay any deposit and deduct the auctioned amount from the amount due and owing (*Horace Brenton Kelly v Margot Cooper & Anor* [1993] AC 205; *Bray v Ford* [1896] AC 51; *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [2000] 2 MLJ 353 at p 377).

MY FINDINGS REGARDING THE DEFENDANT'S GROUNDS (A–H)

[36] As mentioned above, the transaction before me had Islam as its foundation. That being so certain formalities must be adhered to of which have to be complied with by the plaintiff. Under the Islamic Law of Contract, the Arabic word for contract is al-aqd, which literally means an obligation or tie. It is an act of sealing a bargain (*Shariah: The Islamic Law* by Abdur Rahman I Doi p 354). After the offer and acceptance has been concluded, the obligation that arises out of that conclusive contract is called 'Uqud', thereafter to be fulfilled or complied with (Quran Ch 5:1).

[37] Stripped of all the heavy Arabic sounding words, any law student will feel less intimidated by any Islamic contractual transactions, as the fundamentals are not too dissimilar with most common-law contract. The latter and the Islamic contractual transactions in fact are not too dissimilar in their treatment too to all contracts, even those that are a bit dodgy eg those tainted by fraud, misrepresentation, inducement etc. Agreeably any Islamic contracts that are un-Islamic eg having elements of usury (riba) must be unenforceable for those who have subjugated themselves to that format.

[38] I now explain briefly as regards an Al-Bai Bithaman Ajil facility, as reflected in this case, which normally follows the following processes:

[39] A bank finances a customer who wishes to acquire a given asset but defers the payment of that asset for a specific period or to pay by instalment. For a large amount as in this case, the bank may also finance on the basis of syndication of financiers. The bank determines the requirements of the customer as to the period and manner of payment. It thereafter purchases the relevant asset and then later sells it to that customer at an agreed price, which comprises the cost of the asset and the bank's profit margin. It then contracts to allow the customer to settle the payment by instalments within the period and in

A the manner agreed (Islamic Banking Practice from the Practitioner's Perspective by BIMB). This manner of contract has never been expressly prohibited by Islam, and quite well entrenched in Malaysia. It is accepted by Malaysian courts and public at large, and has been given due recognition by the international community.

B **[40]** Having appreciated the available facts, I am satisfied that the papers of the plaintiff were in order in relation to the prerequisites of the contract, and hence the regularity of the Al-Bai Bithaman Ajil facility. All the participating parties had agreed to the type of contract, ie Islamic based, the type and number of facilities, the amount, the mode of payment, period of payment, the profit C margin of the plaintiff, the format of the securities, and all the other necessary details.

[41] If times had been good, this litigation would not have been initiated, let alone the transaction be attacked with such vitriolic vehemence as being D un-Islamic and void. Likewise if times had been good, come the completion date of the agreements, the defendant would not even have found it necessary to whimper of their so-called 'un-Islamic' ingredients. The defendant cannot deny that it has already received the money by the indirect method of acquiring the impugned land. Unfortunately faced with the current recessionary reality repayment became a huge problem for the defendant. Whether unwilling or E incapable of complying with the conditions of the facilities given, despite having received the fruits of the agreements, the defendant now strangely protests, and ungraciously attempts to find faults with the transaction.

[42] In support of its assertion of the existence of usury, the defendant had F ingeniously deducted the cost price of the impugned land from the aggregate sum, and thereafter divided the profit by the number of months needed to complete the agreement. The sum derived, which could be converted and reflected into a certain percentage, in one year was thereafter alleged to be interest.

G **[43]** Notwithstanding the above, I reject any argument that injects the argument that it is not permissible to buy on credit, especially when there is mutual consent. Even Prophet Muhammad had occasion to buy some grain from a Jew to be paid at a specific time, with his coat of mail as security. I am unable to acquiesce to any argument too that, just because a larger sum is agreed to be paid back founded on a buy back concept, with the defendant H openly having requested for deferred payment, and with the differential sum resembling interest, the agreement must be void. I am unable to acquiesce to such a suggestion as there is no clear text that prohibits such a transaction entrenched with all those ingredients. Even the followers of the Shafii and Hanafi schools and the majority of Muslim scholars consider it lawful, calling it I 'Shifa al ilal fi hokum ziyadat al-thamam li mujarrad al-ajal (translated: The reason for increasing the price due to lapse of time)' (*The Lawful and Prohibited in Islam* by Yusuf al-Qaradawi). I therefore reject the argument of the defendant that,

just because the defendant pays more than what was needed to buy the impugned property, such sum (here called profit) must be interest per se.

[44] Conclusion: I therefore reject ground A of the defendant as a 'cause to the contrary'.

[45] I now touch on the agency factor. This poser had initially caused some concern to me in the course of perusing the facts, especially in relation to the status of the plaintiff vis-a-vis the defendant. The plaintiff has consistently, whether in its writ and statement of claims or supporting affidavits, claimed that it is the arranger and agent of the Vendors whilst the defendant has asserted otherwise. The defendant in its affidavit, sworn on 8 August 2002, had affirmed that the plaintiff was actually its agent. According to the defendant, on 22September 1995 the plaintiff had written to the defendant to act as its agent to secure a term loan to part finance the purchase of the impugned land in particular the 2076 acres of land in the District of Ulu Selangor, Selangor Darul Ehsan.

[46] Having perused all the documentary evidence, especially the rebuttals, I am satisfied that, as imprinted clearly on the contractual documents between the defendant and the vendors pertaining to the impugned land, the plaintiff had actually acted as the agent of the latter. I am satisfied also that for both the first and second charges, apart from the plaintiff acting as an agent of the vendor, they were also created in its favour. Thus the *locus standi* of the plaintiff to initiate the originating summons emanated from the very charges created in its favour.

[47] Conclusion: I therefore reject ground F of the defendant as a 'cause to the contrary'.

[48] I am in full agreement with the argument of the defendant as regards ground G, as the damages sought are too ambiguous and not particularised, and thus prejudicial to the defendant. Likewise as regards ground H the plaintiff by being the arranger, agent and part

[49] Vendor will give rise to a serious conflict of interests, which offends all notions of equity and justice, if it were permitted to bid at the public auction without having to pay any deposit. In the circumstances of the case, and despite s 259(2)(a) of the NLC, I believe it should not even be permitted to participate in the auction. Regardless of that this ground is not sufficient to qualiiy as 'cause to the contrary' to prevent any auction order.

[50] Conclusion: Even though grounds G and H of the defendant are accepted they merely relate to the other minor prayers.

[51] It is normal, as in this case that under the contract of al-Bai Bithaman Ajil, the relevant bank will provide facilities of muqassah or rebate for any customer who prepays (*BIMB v Adnan bin Omar* [1994] 3 AMR 2291; encl 2).

Such a facility only occurs on the assumption that the customer sticks to his instalment schedules without default. As it were here, as the defendant had failed to keep up to its bargain, which had triggered the recalling of the facilities, any rebate if given would absolutely be based on pure sympathy and indulgence. On the other hand for the sake of discussion, technically speaking if the plaintiff auctions off the impugned property, and a full sum is recovered surely it could be construed that the account is settled completely earlier than expected even though besmirched by the default, thus entitling some rebate? I will not speculate whether the sale price obtained from the auction will be more than enough to cover the utilised facilities, something that can be answered only after an order of sale has been made. In the circumstances of this current case, in the event the property is ordered to be auctioned off, the period that has lapsed from the default date until now, is about the same length of period to complete the deferred payments as in the agreements. That right to rebate, if any, thus had dissipated not only with the precipitation of the default instalment, but also the exhaustion of time with the completion contractual time having arrived. Based on all these grounds, the issue of the defendant being deprived of the rebate, by reason of the recalling of the facilities cannot qualify as a 'cause to the contrary.'

[52] Conclusion: I therefore reject ground E.

[53] I now touch on ground B, where the defendant has asserted that the statement of accounts in all the plaintiff's affidavit in support, were calculated based on the summary judgments of civil suits D6–22–2801 of 1998 and D6–22–2800 of 1998 dated 31 October 2000, later to be set aside by the High Court on 24 October 2001 (hereinafter called the botched orders). A brief perusal may give the impression that a fundamental error has occurred occasioning a deserving dismissal of the originating summons.

[54] Regardless of the above, as regards the first charge the Form 16D notice of default with respect to a charge dated 7 June 2000 pursuant to s 254 of the NLC, clearly stated the original sum of RM197,187,500 as having been left unpaid on 27 June 2000. Pertaining to the second charge, the letter of demand and Form 16D, also dated 7 June 2000, showed the original sum owing as RM47,920,726.52. These two sums remained unchanged, except for the two respective payments on 28 March 2001 as mentioned above, as reflected in all the supplementary affidavits, meant to show- the latest amounts due from the defendant. The sums had remained static, as any increase would invariably have meant that such increased sum could be construed as interest. As no interest existed in these transactions, it would defy logic if any increase could be detected, hence the interest stated as being nil (O 83 of the RHC 1980).

[55] The want of information, as regards the interest in the supplementary affidavits, does not mean that there is non-compliance of O 83 r 3(3)(c) of the RHC 1980. Bearing in mind that this is a non-bearing interest transaction,

and I have not directed the impossible ie for the plaintiff to particularise the interest, but the instalment in arrears at the date of issue of the originating summons, and at the date of the 'last amount due' affidavit are sufficiently supplied (and the information of sub-para (b), (d) and (a) reflected by the repurchase sums ('the amount of the advance') having been sufficiently particularised), the papers thus are in order.

[56] It must be understood that O 83 r 3(3) of the RHC 1980 at sub-paragraph (d) speaks of the amount remaining due under the charge, statutorily required to be mentioned in the supplementary affidavit (affidavit lanjutan). That latter affidavit invariably holds the complete information, colloquially referred tof as 'the last amount due'. It is no mystery that the objective of O83 r 3(3) is primarily to inform any defendant how much precisely is being claimed, and from there for him to decide whether to contest the originating summons or not (*Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608). It is also no surprise that, after having received the 'last amount due' affidavit (call it supplementary affidavit or affidavit lanjutan) hard-pressed debtors invariably will not appear to court, or if they do, will submit meekly to the foreclosure application.

[57] Admittedly, indeed the Statement of Accounts had erroneously stated the botched summary judgments' orders of civil suits D6–22–2801 of 1998 and D6–22–2800 of 1998 in them. Undeniably too not only were the owed amounts, except for the deducted sums, similar in the letter of demands, the notices of 16D, the botched summary judgment orders, but also in the supplementary affidavits that would indicate the last amounts due from the defendant. Whether the premise of the statement of accounts based on the botched summary judgments were typographical errors or not, the plaintiff had rectified the flaw promptly. Here the plaintiff had magnanimously admitted the unintended error. It is established law that, so long as the correct amount is before the court at the final hearing, then the court may dispense with certain minor omissions or errors that do not fall under the category of 'cause to the contrary'. As the sum had remained unchanged, with the error being temporary and merely procedural in nature, let alone the defendant was never prejudiced by those botched references, I am unable to agree that this factor sufficed to qualify as 'cause to the contrary'.

[58] Conclusion: I therefore reject the defendant's ground B.

[59] The defendant also alleged that sums not lawfully due to the plaintiff have been included in the statement of accounts, in the like of unlawful or erroneous auction and valuation fees for certain parcels of Land Office Titles, which are not covered by s 256(1) of the NLC. Perhaps realising that mistake the plaintiff had withdrawn them from the eventual supplementary affidavits. Similar to the reasons for rejecting ground E, as the eventual owed sums were unchanged except for the two subsequent payments, and I likewise find this

error to be non-prejudicial to the defendant, I therefore also reject this ground to be a 'cause to the contrary'.

[60] Conclusion: I reject the defendant's ground of C as a possible ground of 'cause to the contrary'.

[61] It is now quite established that a covenanted certificate of indebtedness is conclusive evidence of the liability and the amount a borrower has to pay, unless there is manifest error in it (*Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363 and *Bangkok Bank Ltd v Cheng Lip Kwong* [1990] 2 MLJ 5). The acceptability of such evidence up front is based on the assumption that bankers or brokers are honest and reliable men of business. That being so, the bare allegation of the non-production of sufficient evidence had caused serious injustice and detriment to the defendant cannot stand. For a fact there was sufficient evidence before me, to show the evidence of debt, coming in the form of a statement of account/certificate produced by the plaintiff to substantiate its claim (eg encl 17/PSS–5; PSS–6; affidavit lanjutan V111)).

[62] Conclusion: I therefore reject the defendant's ground of D as a 'cause to the contrary'.

[63] To wind it up, the Privy Council in *Keng Soon Finance Bhd v MFC Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457 had in crystalline terms said that s 256 (3) of the NLC is mandatory. It had advised that the court shall order a sale unless it is satisfied of the existence of 'cause to the contrary'. A court also cannot refuse the relief of sale merely on the basis of feeling sorry for the borrower or because it regards the lender as arrogant, boorish or unmannerly. That being so, even though the defendant may have to pay such a substantial sum, and much sympathy may be evoked because of that, such sentiment per se cannot be construed as 'cause to the contrary'.

[64] Parties have agreed before executing the agreements, and without any undue pressure or persuasion, to the preconditions of the Islamic based contract. As mentioned above, as parties have agreed to be bound by the al-aqd and hence have a conclusive contract (Uqud), they are thus bound by the obligation. Both parties are equally bound and must comply with the conditions of the Uqud as ordained by Allah at Ch 5:1 of the al-Quran. On that premise the defendant here must comply, and be bound by his willingness to contract into the impugned agreements. He cannot contract out now unless there are cogent reasons to justify that act. Here I found none.

[65] Having scrutinised the submission of the defendant as regards the posers of 'cause to the contrary', the defendant also has failed to establish on equity or some rule of law that the order should not be given. With the defendant having failed under the last bastion and catch all defence, categorised as the third case in the Federal Court in Low *Lee Lian v Ban Hin Lee Bank Bhd* [1997]

1 MLJ 7, the defendant thus has failed to establish any defence under all three categories. That being so, I therefore pronounce that an order in terms with costs be given pertaining to the summons, but restricted only to the sale prayer. Such sale must be by way of public auction only and no other.

Order accordingly.

Reported by Peter Ling