Light Style Sdn Bhd v KFH Ijarah House (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D4–22A–401 OF 2008
ROHANA YUSUF J
6 MARCH 2009

Banking — Banking and Financial Institutions Act 1989 — s 6(4) — Murabaha sale agreement — Whether defendant carrying out banking business — Whether without licence — Whether contravened the Banking and Financial Institutions Act 1989 — Whether fatal to plaintiff's case

Banking — Banks and banking business — Islamic banking — Murabaha sale agreement — Whether an Islamic banking business — Whether defendant deemed to carry Islamic banking business

Civil Procedure — Winding up — Liquidators — Injunction to restrain — Allegation of multiplicity of proceedings — Frank and full disclosure of material facts — Failure of disclosure — Whether failure established — Whether fatal to plaintiff's case

Companies and corporations — Winding up — Service of notice pursuant to s 218 of the Companies Act 1965 — Murabaha sale agreement — Default in payment — Plaintiff sought injunctive relief — Allegation of illegality and invalidity of agreement and multiplicity of proceedings — Whether allegation totally unwarranted and misleading — Principles applicable in granting injunctive relief

Words and Phrases — 'Banking business' — Definition of — Whether to be read conjunctively or disjunctively — Banking and Financial Institutions Act 1989 s 2

The defendant had offered the plaintiff revolving trade line facilities up to a sum of RM5,600,000. The plaintiff had utilised the said facilities on 17 separate occasions. In each of the transactions, the plaintiff had requested the defendant to purchase goods, mainly lighting products from a particular supplier, based on the quotations, proforma invoices or sale contracts. The defendant would accordingly purchase the required lighting products from the supplier, upon an undertaking that the plaintiff would buy the same from

the defendant. This undertaking was made under the 'Promise to Purchase Agreement'. The plaintiff would thereafter, enter into a sale and purchase agreement to buy the said lighting products from the defendant. In furtherance to the 'promise to purchase agreement', the parties entered into a 'murabaha sale agreement'. By this murabaha sale agreement, the defendant sold to the plaintiff the lighting products at an agreed price. It was a material term of the murabaha agreement that the plaintiff would pay the purchase consideration by way of lump sum payment six months after the defendant had made payment to the supplier. The plaintiff had defaulted payment in nine of the murabaha sale agreements and accordingly, the defendant issued a demand notice, claiming the amount outstanding. As the plaintiff had failed to comply with the said demand notice, the defendant issued a statutory notice under s 218 of the Companies Act 1965 ('the Act'), demanding for the same. The plaintiff herein was seeking an injunctive relief against the winding up petition, on two main grounds; firstly, that there was multiplicity of proceedings and secondly, that the debt was being seriously disputed by the plaintiff. In relation to the first ground, the plaintiff contended that the murabaha sale agreements were being pursued under two existing civil suits. In relation to the second ground, the plaintiff's main contention was the illegality and invalidity of the agreements. The plaintiff contended that the murabaha sale agreements were in contravention of the Banking and Financial Institutions Act 1989 ('the BAFIA'), the Islamic Banking Act 1983 ('the IBA') and the Money Lenders Act 1951 ('the MLA'). The contraventions, according to the plaintiff, were pending determination in both the two civil suits and hence it should be disposed first before the defendant may be able to take drastic measure in presenting a winding up petition against them.

Held, dismissing the plaintiff's application with costs:

(1) The duty to make full and frank disclosure of material facts is a requirement that the plaintiff must comply in an application of this nature. The conduct of the plaintiff in trying to mislead the court into believing that there was multiplicity itself was a good ground to refuse the injunctive relief sought. In the present case, the plaintiff's neglect to disclose that the agreements in the two suits and that s 218 of the Act notices were not the same, instead of suggesting otherwise when alleging multiplicity of proceedings, amounted to a clear failure to provide a full and frank disclosure and was fatal to the plaintiff's case (see para 10).

(2) The disputes in the two civil suits centred on similar allegation of illegality. Though it was true that similar issues were pending in the two civil suits, they were issues of law, involving the interpretations of the

various provisions, which may be tried summarily in this application. As such, there was no necessity to wait for its determination in a trial proper. Therefore, there was no real basis to injunct any presentation of a winding up petition pending the disposal of these issues (see para 12).

(3) The business under BAFIA permitted to be undertaken by the defendant was only leasing business. In the same token, it could not be interpreted to mean that the defendant could not undertake any other business outside BAFIA. Therefore, there was no basis to say that the defendant had contravened any of the provisions in the BAFIA in the transaction with the plaintiff (see paras 17 & 20).

(4) The 'banking business' in the IBA must necessitate that it is a business of taking deposit and providing financing as well issuing cheques. Providing financing alone is not carrying out 'banking business' under the IBA. Thus, despite the exhs CWM01, CWM02 and CWM03 advertising the defendant's financing facilities, it could not be said that the defendant was operating a banking business either under the BAFIA or IBA (see para 26).

(5) The murabaha sale agreement was essentially a plain straightforward sale and purchase agreement, which the plaintiff agreed to be bound on its own free will. There were no clauses in the murabaha sale agreement that could be construed to suggest a money lending transaction. The murabaha sale agreement was at the parties own freewill, it was not for this court to reclassify or reinterpret it as a money lending agreement. It was also not for the plaintiff now to come to court to dispute what it had agreed (see paras 27 & 29).

(6) The law on the principles of restraining a winding up petition is found in the various decisions of the court. It is an axiomatic principle of law that presentation of a winding up petition may be restrained by way of injunction where its presentation is an abuse of court process. That being the case, it was not sufficient for the applicant to merely raise triable issues to obtain the injunctive relief against the petition for winding up but the plaintiff must indeed establish that there was a bona fide dispute of the debt on substantial ground (see para 35).

[Bahasa Malaysia summary

Defendan telah menawarkan plaintif kemudahan talian pusingan dagangan sehingga jumlah RM5,600,000. Plaintif telah menggunakan kemudahan tersebut sebanyak 17 kali berasingan. Dalam setiap transaksi, plaintif telah meminta defendan membeli barangan, terutamanya produk lampu daripada pembekal tertentu, berdasarkan kuota, invois proforma atau kontrak jualan. Defendan kemudian akan membeli produk lampu yang diperlukan daripada

pembekal itu, dengan akujanji bahawa plaintif akan membeli yang sama daripada defendan. Akujanji ini dibuat di bawah 'Promise to Purchase Agreement'. Plaintif selepas itu, telah memasuki perjanjian jualbeli untuk membeli produk lampu tersebut daripada defendan. Berikutan 'Promise to Purchase Agreement' itu, pihak-pihak telah memasuki 'murabaha sale agreement'. Melalui perjanjian jualan murabaha ini, defendan telah menjual kepada plaintif produk lampu pada harga yang dipersetujui. Ia merupakan terma penting dalam perjanjian murabaha bahawa plaintif akan membayar balasan belian melalui bayaran sekaligus setelah enam bulan defendan membuat bayaran kepada pembekal. Plaintif gagal membuat bayaran dalam sembilan perjanjian jualan murabaha dan seterusnya defendan telah mengeluarkan notis tuntutan, menuntut baki jumlah. Oleh kerana plaintif telah gagal mematuhi notis tuntutan tersebut, defendan telah mengeluarkan notis statutori di bawah s 218 Akta Syarikat 1965 ('Akta tersebut'), menuntut yang sama. Plaintif di sini memohon relief injunksi terhadap petisyen penggulungan, atas dua alasan utama: pertama, bahawa terdapat kepelbagaian prosiding dan kedua, bahawa hutang itu telah dipertikaikan dengan serius oleh plaintif. Berhubung alasan pertama, plaintif menegaskan bahawa perjanjian-perjanjian jualan murabaha tersebut dimulakan di bawah dua guaman sivil sedia ada. Berhubung alasan kedua, hujah utama plaintif adalah tentang perjanjian-perjanjian tersebut yang menyalahi undang-undang dan tidak sah. Plaintif menegaskan bahawa perjanjian-perjanjian jualan murabaha tersebut bertentangan dengan Akta Perbankan dan Institusi Kewangan 1989 ('BAFIA'), Akta Perbankan Islam 1983 ('IBA') dan Akta Pemberipinjam Wang 1951 ('MLA'). Percanggahan tersebut, menurut plaintif, menunggu penentuan kedua-dua guaman sivil tersebut dan justeru itu ia patut diselesaikan terlebih dahulu sebelum defendan boleh mengambil langkah drastik mengemukakan petisyen penggulungan terhadap mereka.

Diputuskan, menolak permohonan plaintif dengan kos:

(1) Kewajipan untuk membuat pendedahan sepenuh dan sebenarnya fakta penting adalah keperluan yang mesti dipatuhi oleh plaintif dalam permohonan bersifat sebegini. Perbuatan plaintif yang cuba untuk mengelirukan mahkamah agar mempercayai bahawa terdapat kepelbagaian dengan sendirinya adalah alasan yang baik untuk menolak relief injunksi yang dipohon. Dalam kes ini, kecuaian plaintif untuk mengemukakan bahawa perjanjian-perjanjian tersebut dalam dua guaman itu dan bahawa notis-notis s 218 Akta tersebut bukan yang sama, sebaliknya mencadangkan sebaliknya semasa mendakwa kepelbagaian prosiding, membentuk kegagalan yang nyata untuk mengemukakan pendedahan penuh dan benar dan memudaratkan kes plaintif (lihat perenggan 10).

(2) Pertikaian-pertikaian dalam dua guaman sivil atas tersebut berkisarkan pengataan yang sama tentang kepenyalahan undang-undang. Meskipun ianya benar bahawa isu-isu yang sama menunggu penyelesaian dua guaman sivil tersebut, ianya isu-isu perundangan, yang melibatkan pentafsiran pelbagai peruntukan, yang boleh dibicarakan terus dalam permohonan ini. Oleh demikian, tiada keperluan untuk menunggu penentuannya dalam perbicaraan sewajarnya. Dengan itu, tiada asas sebenar untuk memerintahkan apa-apa pengemukaan petisyen penggulungan sementara menunggu penyelesaian isu-isu berikut (lihat perenggan 12).

(3) Perniagaan di bawah BAFIA membenarkan defendan untuk menjalankan perniagaan penyewaan sahaja. Begitu juga, ia tidak boleh ditafsirkan untuk bermaksud bahawa defendan tidak boleh menjalankan apa-apa perniagaan lain di luar BAFIA. Oleh itu, tiada asas untuk mengatakan bahawa defendan telah melanggar mana-mana peruntukan dalam BAFIA dalam transaksi dengan plaintif (lihat perenggan 17 & 20).

(4) 'Banking business' dalam IBA mestilah bermaksud bahawa ia merupakan sebuah perniagaan mengambil deposit dan membiayai kewangan dan juga mengeluarkan cek-cek. Pembiayaan kewangan sahaja bukanlah menjalankan 'banking business' di bawah IBA. Oleh itu, meskipun eksh CWM01, CWM02 dan CWM03 memaparkan kemudahan kewangan defendan, ia tidak boleh dikatakan bahawa defendan menjalankan perniagaan perbankan sama ada di bawah BAFIA atau IBA (lihat perenggan 26).

(5) Perjanjian jualan murabaha pada dasarnya perjanjian jual beli biasa yang jelas dan mudah, yang mana plaintif telah bersetuju terikat dengan kerelaannya sendiri. Tiada fasal dalam perjanjian jualan murabaha yang boleh ditafsirkan cadangan transaksi pemberi pinjaman wang. Perjanjian jualan murabaha adalah atas kerelaan sendiri pihak-pihak, ia bukan untuk mahkamah mengklasifikasikan semula atau mentafsirkan semulanya sebagai perjanjian pemberi pinjaman. Plaintif juga kini tidak boleh ke mahkamah mempertikaikan apa yang telah dipersetujui (lihat perenggan 27 & 29).

(6) Undang-undang berdasarkan prinsip-prinsip menghalang petisyen penggulungan yang didapati dalam pelbagai keputusan mahkamah. Adalah prinsip undang-undang yang tak boleh disangkal bahawa penyampaian petisyen penggulungan boleh dihalang dengan injunksi jika penyampaiannya merupakan penyalahgunaan proses mahkamah. Jika begitu, adalah tidak mencukupi untuk pemohon menimbulkan isu-isu yang perlu dibicarakan sahaja bagi memperoleh relief injunksi terhadap petisyen penggulungan bahkan plaintif sepatutnya

membuktikan bahawa terdapat pertikaian bona fide mengenai hutang atas alasan yang berasas (lihat perenggan 35).]

Notes

For a case on liquidators, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 8004.

For a case on s 6(4) of the Banking and Financial Institution Act 1989, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1876.

For cases on Islamic banking, see 1 *Mallal's Digest* (2005 Reissue) paras 1952–1954.

For cases on service of notice pursuant to s 218 of the Companies Act 1965, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1509–1510.

Cases referred to

American Cyanamid Co v Ethicon [1975] 2 AC 396, HL (refd)

Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd [2005] 5 MLJ 210, HC (refd)

Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd & Anor [1994] 1 MLJ 369, SC (refd)

Dato' Abd Rahim bin Mohamad v Abdul Farish bin Rashid [2008] MLJU 652, CA (refd)

Gimstern Corporation (M) Sdn Bhd v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302, SC (refd)

Koh Kim Chai v Asia Commercial Banking Corporation Limited [1981] 1 MLJ 196, FC (refd)

Koh Kim Chai v Asia Commercial Banking Corporation Limited [1984] 1 MLJ 322, PC (refd)

Malayan Banking Bhd v Red Box (M) Bhd [2000] 6 CLJ 21, HC (refd)

Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals [2001] 4 MLJ 187; [2001] 3 CLJ 248, CA (refd)

Molop Corp Sdn Bhd v Uniperkasa (M) Sdn Bhd [2003] 6 MLJ 311, HC (refd)

Natseven TV Sdn Bhd v Television New Zealand Ltd (Enclosure 4) [2000] MLJU 511; [2001] 4 CLJ 722, HC (refd)

PP Consultants Pty Ltd v Finance Sector Union [2000] HCA 59 (refd)

RHB Sakura Merchant Bankers Bhd v Tan Sri Dato' Ting Pek Khiing (No 2) [2004] 2 MLJ 315, HC (refd)

Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd [2007] 4 MLJ 355, CA (refd)

United Dominions Trust Ltd v Kirkwood [1996] 1 All ER 968, QBD (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 ss 2, 2(1), 4, 6(4), 45, 125, Schedule 3

Companies Act 1965 s 218

Islamic Banking Act 1983 ss 2, 3

A Money Lenders Act 1951

PS Gill (Gill & Tang) for the plaintiff.
Sivagurunathan (D Paramalingam with him) (Shamiah KE Ng & Siva) for the defendant.

B **Rohana Yusuf J:**

[1] Enclosure 2 is an application by the plaintiff for an interim injunction to restrain the defendant and its servants or agents from filing, presenting, C advertising and or prosecuting a winding up petition against the plaintiff.

BACKGROUND FACTS

D **[2]** The defendant vide letter of offer in exh CWM-07 offered the plaintiff, a revolving trade line facilities up to a sum of RM5,600,000. In accordance with cl (v) in the letter of offer, the plaintiff had utilised the said facilities on 17 separate occasions. In each of the transactions, the plaintiff had requested the defendant to purchase goods, mainly lighting products from a particular E supplier, based on the quotations, proforma invoices or sale contracts. The defendant would accordingly purchase the required lighting products from the supplier, upon an undertaking that the plaintiff would buy the same from the defendant. This undertaking is made under the 'promise to purchase agreement' (see exh KIH-1). The promise to purchase agreement, (see cll 1 F and 3) contemplates that the plaintiff will thereafter, enter into a sale and purchase agreement to buy the said lighting products from the defendant. The terms of sale and the particulars of the lighting products will be spelled out in the sale agreement.

G **[3]** In furtherance to the promise to purchase agreement, the plaintiff and the defendant entered into a 'murabaha sale agreement' (see exh KIH-1). By this murabaha sale agreement, the defendant sold to the plaintiff the lighting products at an agreed price (see cl 5). It is a material term of the murabaha agreement that the plaintiff would pay the purchase consideration by way of H lump sum payment six months after the defendant made payment to the supplier. Thus, for each of the 17 transactions the parties had in fact entered into two sets of agreement viz; the promise to purchase agreement and the murabaha sale agreement, resulting in 17 murabaha sale agreements being concluded between the parties, thus far.

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[4] The plaintiff defaulted payment in nine murabaha sale agreements and the defendant's solicitor then, Messrs Abdul Raman Saad & Associate, issued a demand notice in exh VJB-03 to the plaintiff, claiming the amount outstanding. The plaintiff however, failed to comply with the said demand

notice within the stipulated time. The present solicitor for the defendant subsequently issued a statutory notice under s 218 of the Companies Act 1965 in exh VJB-4, demanding for the same.

[5] The plaintiff is now seeking an injunctive relief against a winding up petition being presented against it, on two main grounds; firstly, that there is multiplicity of proceedings and secondly, that the debt is being seriously disputed by the plaintiff. The plaintiff contends that there is multiplicity of proceedings because the same murabaha sale agreements are being pursued under two existing civil suits. While the main contention for the disputing the debt is grounded on alleged illegality and invalidity of the agreements. It is the plaintiff's case that the murabaha sale agreements entered between them are in contravention of the Banking and Financial Institutions Act 1989 ('BAFIA'), the Islamic Banking Act 1983 (IBA) and the Money Lenders Act 1951 ('MLA'). The contraventions, according to learned counsel for the plaintiff are pending determination in both the two civil suits and hence it should be disposed first before the defendant may be able to take drastic measure in presenting a winding up petition against the plaintiff.

MULTIPLICITY OF PROCEEDINGS

[6] Let me first deal with the issue on alleged multiplicity of proceedings raised by the plaintiff. Encik PS Gill of counsel of the plaintiff says that there will be multiplicity of proceedings between the demand in s 218 notice and two civil suits filed by the defendant. According to him the two civil suits, which are pending in this court are in respect of the same murabaha sale agreements as those in the s 218 notice. The Kuala Lumpur High Court Suit No D4–22A–185 of 2008 (the 185 claim) filed on 24 April 2008, is based on four murabaha sale agreements while the Kuala Lumpur Suit No D4–22A–266 of 2008 (the 266 claim) filed on 9 July 2008, is based on two murabaha sale agreements. In both suits, the plaintiff had filed its defence and counterclaim and the defendant had filed its reply.

[7] From the affidavits of the defendant, it has been verified that the nine murabaha sale agreements, which are the subject matter of the s 218 notice herein, are separate and distinct from the two civil suits (185 claim and 266 claim). Learned counsel for the defendant Encik Sivaguru, contends that the plaintiff has misled the court in making this submission. Bearing in mind that, in all there are 17 murabaha sale agreements, the three tables below illustrate which of them are the basis of the claim by the defendant under the two suits and those in the s 218 notice.

[8] Claim 185 is based on the following four murabaha sale agreements described by the account numbers and dates of the agreements respectively:

Account No	Date of the Agreement
00001/02/002444/5	28 June 2007
00001/02/002464/1	01 August 2007
00001/02/002474/4	13 August 2007
00001/02/002479/3	17 August 2007

Claim 266 is based on the following two murabaha sale agreements with respective account numbers and dates:

Account No	Date of the Agreement
00001/02/002506/1	19 September 2007
00001/02/002517/2	28 September 2007

While the s 218 notice is based on the following nine murabaha sale agreements described by the respective account numbers and dates:

Account No	Date of the Agreement
00001/02/002538/1	2 November 2007
00001/02/002560/4	3 December 2007
00001/02/002566/0	24 October 2007
00001/02/002576/9	24 December 2007
00001/02/002581/3	28 December 2007
00001/02/002585/4	8 January 2008
00001/02/002590/9	11 January 2008
00001/02/002591/1	11 January 2008
00001/02/002605/2	31 January 2008

From the above tables it is clear that the demand made by the defendant under s 218 notice does not include the six murabaha sale agreements in the two civil suits.

[9] The plaintiff had submitted erroneously, an allegation of multiplicity of proceedings against the defendant here and had misled the court as to the facts because the subject of both suits, though based on similar murabaha sale agreements, are not the same agreements as in the two civil suits. They are in fact based on the other nine agreements out of the 17 entered between the plaintiff and the defendant and the amount outstanding is RM1,682,245.26. Hence, it is clear that there is no multiplicity of proceedings. Thus, the objection raised by the plaintiff on the issue of multiplicity of proceedings is totally unwarranted and misleading. The plaintiff cannot event feign ignorance when the accounts numbers and date of the murabaha sales agreements are clearly particularised in the statement of claims of both suits (see exh VJB-01 and VJB-02) as well as the s 218 notice.

[10] The duty to make full and frank disclosure of material facts is a requirement that the plaintiff must comply in an application of this nature. The conduct of the plaintiff in trying to mislead the court into believing that there is multiplicity itself, is a good ground to refuse the injunctive relief sought. In *Malayan Banking Bhd v Red Box (M) Bhd* [2000] 6 CLJ 21, the injunction against a winding up petition was refused and one of the grounds is, the respondent's failure to provide a frank and full disclosure at the time the respondent had obtained an ex parte injunction against the bank to restrain it from proceeding with a petition to wind up. At the inter parte hearing the application was accordingly dismissed by reason of such failure. The defendant in that case did not disclose that it has in fact admitted the outstanding debt to the bank. Abdul Malik Ishak J (now JCA) in his judgment at p 33 observes that, 'In other words there must be full, frank and sufficient disclosure otherwise the application will, in the absence of special circumstances, be dismissed'. Similarly, in the present case, the plaintiff's neglect to disclose that the agreements in the two suits and the s 218 notice are not the same and instead suggests otherwise when alleging multiplicity of proceedings, amounts to a clear failure to provide a full and frank disclosure and is fatal to the plaintiff's case.

AGREEMENT INVALID

[11] The next ground put forth by Encik PS Gill for the injunctive relief is premised on the argument that the issues raised in both the two suits as well as s 218 notice revolve around the issue of illegality of the agreements. He contends that these issues should be disposed first, before the defendant can present a winding up petition against the plaintiff.

[12] Based on the submissions of counsel, I note that the disputes in the two civil suits centre on similar allegation of illegality. Though it is true that similar issues are pending in the two civil suits, in my view they are issues of law, involving the interpretations of the various provisions, which may be tried summarily in this application. As such, there is no necessity to wait for its determination in a trial proper. There is therefore no real basis to injunct any presentation of a winding up petition pending the disposal of these issues.

AGREEMENT CONTRAVENES THE BAFIA

[13] In the allegation of illegality, first Encik PS Gill contends that the murabaha sale agreement contravenes the BAFIA because it is an agreement to provide financing, which the defendant is not authorised to do. The basis of En PS Gill's argument is that, the defendant is a company carrying out leasing business, which is a registered scheduled business under s 2(1) and the

Third Schedule of the BAFIA. By virtue of that registration, he argued that the defendant is not authorised to do any non-leasing business, either in the form of financing or banking. In support of his argument, Encik PS Gill had placed reliance on an e-mail communication issued by an officer of the Bank Negara Malaysia (the bank) in response to the plaintiff's solicitor's inquiry (see exh CWM-01.) From the information in the e-mail, he says the defendant is restricted to do leasing business as defined in the BAFIA. He further supported his argument on the basis that the defendant itself admitted that it was not licensed by the bank, when in exh KIH-2 the defendant disclosed that it does not possess a licence from the bank.

[14] Encik PS Gill contends that despite not being licensed, the defendant is carrying out financing as a financial institution. This, according to him is evidenced from exhibits such as CMW-02, CMW-03 and CWM-04, obtained from the defendant's own website, which advertises that the defendant provides financing product.

[15] Encik PS Gill further contends that the provision of *financing* by the defendant is in contravention of the BAFIA because according to him, banking business includes *financing* which by virtue of s 4 cannot be provided by the defendant without a valid license issued by the bank under s 6(4) of the BAFIA. As such, he argued that the murabaha sale agreement being an agreement to provide *financing* offended the BAFIA and cannot be enforced.

[16] Encik Sivaguru for the defendant admitted that the defendant was not providing leasing product per se as per its registered business in the BAFIA. Learned counsel also argued that the defendant's business was not confined to leasing business just because it is registered as a leasing company under the BAFIA. Though the transaction in question may be construed from the letter of offer as providing Islamic finance to the defendant, it is not however banking business under the BAFIA.

[17] The argument by parties calls for interpretations of various provisions of the BAFIA. I have perused the e-mail from the Bank in CMW-01. I am clear that the e-mail does not state that the defendant is precluded from doing other business than leasing. The e-mail in CMW-1 in essence discloses that the business under the BAFIA permitted to be undertaken by the defendant is only leasing business. In the same token, it cannot be interpreted to mean that the defendant cannot undertake any other business outside the BAFIA.

[18] So the question next is whether the defendant is carrying out Banking Business without licence and hence contravenes the BAFIA. Section 4 of the BAFIA provides that, no person shall carry on, inter alia, banking business or

financing business without holding a valid license granted under s 6(4) of the BAFIA. Banking business is defined in s 2 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 by or paid in by customers; and

(iii) provision of finance; or

(b) such other business as the Bank, with the approval of the Minister, may prescribe;

[19] From the above definition, a person is carrying out banking business only if he is in the business of receiving deposits, paying and collecting cheques drawn by customer and providing financing or such other business prescribed by the Minister. Thus, banking business entails the acts of all these three transactions and not just any one of them. From the wordings of s 2 all the three limbs must be read conjunctively and cannot be read disjunctively as suggested by Encik PS Gill. Therefore, if a person is providing only one of the businesses under the three limbs in s 2, say merely providing financing as in this case, but not collecting deposit, such activity would not be sufficient to constitute banking business under this definition. It follows that, even if it is true that the defendant is providing financing in the murabaha sale agreement, the provision of financing per se by the defendant is not a banking business and requires no license under s 6(4) of the BAFIA. Section 6(4) requires licensing only if a person is carrying out, *banking business, finance company business, merchant banking business* or *discount house business*. All these businesses are clearly defined in s 2 of the BAFIA.

[20] It is to be noted that even the definition of 'finance company business' in s 2 entails receiving of deposit and provision of credit, leasing, hire purchase or acquiring rights and interest in hire purchase. In my view there is therefore no basis to say that the defendant has contravened any of the provisons in the BAFIA in the transaction with the plaintiff.

[21] Even if I am wrong in my above finding and even if it can be argued that the transaction undertaken by the defendant is prohibited by the BAFIA, I agree with the argument by Encik Sivaguru that s 125 of the BAFIA would have saved the agreement. Section 125 provides that an agreement in contravention of any provision of the BAFIA cannot be avoided solely by reason of such contravention. Section 125 provides as follows:

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

Thus, notwithstanding any contravention of any provision in the BAFIA, s 125 would have saved the murabaha sale agreement. The Supreme Court had held that a contract made in contravention of s 45 of the BAFIA was saved by s 125 in the case of *Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd & Anor* [1994] 1 MLJ 369. This is because according to the Supreme Court, s 45 does not declare that an agreement made against that section is void. Likewise, there is also no such provision to declare that an agreement made in contravention of s 4 is null and void or illegal. In *RHB Sakura Merchant Bankers Bhd v Tan Sri Dato' Ting Pek Khiing (No 1)* [2004] 2 MLJ 315 the High Court followed the decision in *Coramas Sdn Bhd* on this point.

AGREEMENT CONTRAVENES IBA

[22] The next contention by the plaintiff is that the defendant had offended s 3 of the IBA for providing Islamic banking business and holding itself out as an Islamic Bank without a licence under the IBA. A license is required in s 3 of the IBA to operate an Islamic bank. Islamic banking business is defined under s 2 of the IBA to mean, 'banking business whose aim and operation do not involve any element which is not approved by the religion of Islam'. Accordingly, Encik PS Gill suggested that the murabaha sale agreement is an Islamic banking business and since the defendant is not a licensed Islamic bank it cannot enter into such transaction. Encik Sivaguru did not clearly argue this point, except to contend that the murabaha sale agreement is not defined in the BAFIA and it is a transaction authorised by the memorandum of association of the defendant.

[23] The issue remained to be determined begs the question of whether by entering into a murabaha sale agreement ipso facto deems the defendant to carry out Islamic banking business and accordingly the defendant an Islamic bank? It must be borne in mind that Islamic banking business by definition in the IBA must first, be a banking business and then, it must comply with the requirement of the Islamic law. In other words not every transaction, which *do not involve any element*, *which is not approved by the religion of Islam*, becomes an Islamic banking business. Such interpretation would lead to absurdity. Taken to its extreme it is tantamount to saying that any transaction not prohibited by Islamic law, such as operating a halal kway teow stall is Islamic banking business and accordingly to operate a halal kway teow stall requires license under the IBA. Surely the Legislature cannot have intended such absurdity though the word banking business is not defined in the IBA.

[24] In today's legislation of most jurisdictions, the term, banking business has been given statutory definition. Prior to that, in an old English decision, Lord Denning MR, described banking business in the case of *United Dominions Trust Ltd v Kirkwood* [1996] 1 All ER 968 by taking into account historical analysis back to eighteenth country. Thus in that case (at p 975) he found that, there are two characteristics found in bankers. First, they accept money from, and collect cheques for their customers and place them to their credit. Secondly, they honour cheques or orders drawn on them by their customers when presented for payment and debit their customers accordingly. He further states these two characteristics carry a third one that is they (banks) keep current accounts or something like that nature in their books where credits and debits are entered. This position is reinforced in *Paget's Law of Banking* (6th Ed) at p 8. The Australian court also defines banking business in the same way. In *PP Consultants Pty Ltd v Finance Sector Union* [2000] HCA 59 the High Court of Australia in defining banking business observed as follow:

> The essential characteristics of the business of banking are 'the collection of money by receiving deposits upon loan, repayable when and as expressly or impliedly agreed upon, and the utilisation of the money so collected by lending it again in such sums as are required'. It involves the creation of distinct debtor and creditor relationships between the bank and those who deposit money with it and also, between the bank and those who borrow from it.

[25] In the Privy Council decision from Malaysia *Koh Kim Chai v Asia Commercial Banking Corporation Limited* [1984] 1 MLJ 322, the Privy Council affirming the Federal Court decision in *Koh Kim Chai v Asia Commercial Banking Corporation Limited* [1981] 1 MLJ 196 held that providing a loan to customer in Singapore, secured by a third party charge on land situated in Malaysia is not Banking Business within the meaning of s 2 of the Banking Act 1973 (now repealed by the BAFIA). This was because banking business was defined under that repealed Act as to constitute the three limbs of transactions of receiving money on current or deposit account, paying and collecting cheques drawn by or paid in by customers, and making advances to customers and includes such other business as the Central Bank, with the approval of the Minister may prescribe. Thus making advances to customers per se is not sufficient to constitute banking business, hence no license is required to provide advances to customer. In *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 210; [2006] 8 CLJ 9, Suriyadi J (now JCA) in pointing out the undefined banking business under the IBA, had made reference to the definition of the same under the BAFIA due to the paucity of adequate precedents and authority.

[26] Therefore, it can be safely concluded, as it also becomes amply clear from the above position, that banking business in the IBA must necessitate

A that it is a business of taking deposit and provide financing as well issuing cheques. Providing financing alone is not carrying out banking business under the IBA. Thus despite the exhs CWM-01, CWM-02 and CWM-03 advertising the defendant providing financing facilities, it cannot be said that the defendant is operating banking business either under the BAFIA or IBA.

B

[27] I am also in agreement with the contention of Encik Sivaguru for the defendant that murabaha sale agreement has not been defined in the IBA or any law thereby not a regulated business transaction. I further agree with him that the murabaha sale agreement is essentially a plain straight forward sale and purchase agreement, which the plaintiff agrees to be bound on its own free will. I will deliberate on the nature of murabaha sale agreement in dealing with the next sub-heading in the foregoing paragraphs.

C

D AGREEMENT CONTRAVENES MLA

[28] The next contention launched by Encik PS Gill is that the defendant is circumventing MLA in entering murabaha sale agreement. He argued that the murabaha sale agreement is a money lending transaction and by virtue of E s 2 it is an illegal agreement because the defendant has not been licensed under that Act. For the defendant, it maintained the argument that, the murabaha sale agreement is a trading transaction, which is in line with its objective and is within its memorandum of association shown in exh KIH 2.

F **[29]** It must be noted that the plaintiff never denies signing the letter of offer in exh KIH 3. The plaintiff never denies signing the murabaha sale agreements in question. It would then be crucial to examine the terms and purport of the murabaha sale agreement. In the recital it is clearly stipulated that it was entered pursuant to the promise to purchase agreement (as G reiterated in Recital 1). Clause 3 further confirms that the buyer (plaintiff) had inspected the conditions of the goods and found them to be free from defects and deemed to have accepted them without any further right to rescind on such grounds or to claim for any damages. Clause 4 provides for the purchase consideration. The mode of payment in cl 5, obliged the H plaintiff to pay the defendant six months from the date the defendant made the first payment to the supplier. These terms disclose that the parties intended and characterise a sale and purchase agreement. The transaction is nothing more than a simple sale and purchase agreement and this cannot be said to be offending MLA as suggested by the counsel for the plaintiff. I do I not find any clause in the murabaha sale agreement that can be construed to suggest a money lending transaction. The plaintiff cannot now give a different interpretation to the agreement that the plaintiff and the defendant had agreed in its plain clear language. The murabaha sale agreement was entered on those premise and at their own freewill, it is not for this court to

reclassify or reinterpret it as a Money Lending Agreement. It is also not for the plaintiff now to come to court to dispute what it has clearly agreed.

[30] If the plaintiff itself was conspiring with the defendant, to circumvent the MLA, then the plaintiff is doing so, at its own peril. That being the case the plaintiff is not entitled to an equitable relief that it is now seeking. It is a well established principle that no man can take advantage of his own wrong based on the legal maxim 'nullus commodum capere potest de injuria sua propri'. This principle is supported by a long line of authority and requires no further deliberation. In the Supreme Court case of *Gimstern Corporation (M) Sdn Bhd v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302, upon a finding that reliance on certain clause of a contract would entitle the defendant to benefit from its own wrong Wan Hamzah SCJ finds that a blameable party cannot take advantage of his own wrong to end a contract. He summarised the proposition in the following terms at p 304:

> The rule is that if a stipulation in a contract be that the contract shall be void on the happening of an event which one or either of the parties can by his own act or omission bring about, then the party who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong to put an end to the contract.

[31] In *Dato' Abd Rahim bin Mohamad v Abdul Farish bin Rashid* [2008] MLJU 652, a decision of the apeal court, Gopal Sri Ram JCA in his oral judgment held, inter alia, that '... there is a presumptive rule of construction that a party is not to be permitted to take advantage of his own wrong'.

[32] Based on the above authorities, in my view, it would be an affront to public conscience to grant the relief that the plaintiff is seeking.

[33] Encik PS Gill further submitted that, if the murabaha sale agreement is not to be construed as money lending agreement MLA can be circumvented by any person entering into this agreement, masquerading it as a sale and purchase agreement for want of compliant with Islamic principle. He suggested that there is therefore a lacuna in the MLA. If it is true, there is a lacuna and an abuse by the companies to circumvent MLA by entering into Islamic compliant transactions, there are governmental authorities both religious and financial to address them, in line with the policies of the government. The court should not be too quick to interfere and meddle in a matter of policy and to impose a constraint on a subject matter, which is not intended to be regulated by any legislation.

[34] The rule on interpretation of statutes and the contractual documents are what the court will have to adhere to. The court cannot simply abandon basic rule of interpretation merely on any flimsy suggestion of a lacuna. Even if one is to understand that the objective of MLA is to protect consumer against the wrath of moneylenders, the plaintiff here is a sophisticated borrower, a trading company having been in the business transaction over the years. It entered into the murabaha sale agreement well informed and on its own free will. I would not be wrong to presume that the plaintiff would have had various other options getting financing for its business. The plaintiff chose the offer made by the defendant on its own freewill. What is regrettable is that having agreed to be bound by the terms of the contract, and benefiting from it, the plaintiff now turns around to challenge the very transaction it entered as having contravened the laws, which the plaintiff ought to have been aware in the first place. To my mind, this category of plaintiff cannot invoke any assistance of this court for an equitable relief.

LAW ON RESTRAINING WINDING UP

[35] I do not agree with both counsel's submission that I should apply the test in the *American Cyanamid Co v Ethicon* [1975] 2 AC 396 in deciding whether to grant the injunctive relies sought by the plaintiff. The law on the principles of restraining a winding up petition is found in the various decisions of the court. It is an axiomatic principle of law that presentation of a winding up petition may be restrained by way of injunction where its presentation is an abuse of court process. That being the case, it is not sufficient for the applicant to merely raise triable issue to obtain the injunctive relief against petition for winding up but the plaintiff must indeed establish that there is a bona fide dispute of the debt on substantial ground. The Court of Appeal case of *Tan Kok Tong v Hoe Hong Trading Company Sdn Bhd* [2007] 4 MLJ which cite with approval, the High Court decisions in *Natseven TV Sdn Bhd v Television New Zealand Ltd (Enclosure 4)* [2000] MLJU 511; [2001] 4 CLJ 722 and *Molop Corp Sdn Bhd v Uniperkasa (M) Sdn Bhd* [2002] 6 MLJ 31 acknowledges that, the test in *American Cyanamid* of raising triable issue does not apply. The plaintiff will have to raise more than just a triable issue, instead the plaintiff must either mount up a prima facie case by necessary evidence that the debt is in bona fide dispute or that the plaintiff is solvent. The plaintiff here is not denying the debt, but instead raises issues; on the erroneous allegation of multiplicity of proceedings and that, the agreements flout the BAFIA, IBA and the MLA. I cannot agree with all these contentions as I have earlier addressed each of the points raised. No attempt is made to raise a bona fide dispute of the debt or that the plaintiff is solvent. In fact, it would have been more appropriate for the plaintiff to raise all these issues at the winding up petition itself. As observed by Abdul Hamid Mohammad JCA (who later became the Chief Justice) in

Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals [2001] 4 MLJ 187; [2001] 3 CLJ 248, that there is an unhealthy trend among respondents in a winding up petition to make all kinds of interlocutory application to stall the hearing of petition proper, and should be discouraged. The arguments should be brought to the winding up court instead.

[36] Based on the foregoing, I am satisfied that the plaintiff has not established a prima facie evidence to dispute the debt for me to restrain a winding up petition be presented against the plaintiff. For all the above reasons, I hereby dismiss the application of the plaintiff in encl 2 with costs.

Plaintiff's application dismissed with costs.

Reported by Ashgar Ali Ali Mohamed