

Bank Kerjasama Rakyat Malaysia Bhd v Sea Oil Mill (1979) Sdn Bhd & Anor A

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-23 OF 2009(W) B
 RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASHIM YUSOFF AND GOPAL SRI RAM FCJJ
 22 OCTOBER 2009

Banking — Banks and banking business — Islamic banking — Bai-al-Inah facility — Default in payment — Whether Bank Kerjasama Rakyat Malaysia Bhd authorised to conduct Islamic banking business — Whether board of directors specifically approved Islamic banking transactions — Whether transaction ultra vires powers, void and unenforceable D

Banking — Securities for advances — Guarantee — Liability of guarantor — Summary judgment obtained against borrower and guarantor — Borrower's appeal against summary judgment struck out for want of leave — Whether guarantor could in its appeal again raise issues decided by High Court against borrower — Whether liability of guarantor remained — Contracts Act 1950 s 81 E

Civil Procedure — Summary judgment — Banking — Islamic banking transaction — Bai-al-Inah facility — Appeal against — Whether simple and obvious case for summary judgment — Whether there were bona fide triable issues — Rules of the High Court 1980 O 14 F

The appellant/plaintiff gave a revolving credit facility pursuant to an Islamic banking facility of *al-Tarkhis* (*Bai-al-Inah* principle) to the first respondent with the second respondent as the guarantor. The first respondent defaulted in its repayment and the appellant commenced an action against the respondents for recovery of the facility. The appellant obtained summary judgment in the High Court against both respondents. The respondents appealed to the Court of Appeal. The Court of Appeal struck out the first respondent's appeal since it was in liquidation and leave of court had not been obtained to proceed with the appeal. The second respondent's appeal was allowed on the grounds that there was a triable issue regarding whether the appellant had the capacity in law to carry on Islamic banking business. The Court of Appeal relied on the Development Financial Institution Act 2002 which prohibits the appellant from carrying any Islamic banking business before obtaining the written approval of the Central Bank. The learned High Court judge however had found that the appellant's operation using the I

- A Shariah principles were in order and in accordance of the appellant's board of directors' resolution as provided under the Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978 ('Act 202'). Leave was granted to the appellant to appeal to the Federal Court on the following question of law:
- B by the High Court against the first respondent as the borrower whereas judgment against the first respondent was maintained by the Court of Appeal and furthermore the second respondent did not and had never challenged the guarantee agreement signed.
- C **Held**, allowing the appeal with costs:
- (1) The appellant's operation using the Shariah concept was in order as it was in accordance with the resolution of its board of directors, as provided under Act 202 (see para 12).
- D (2) Since the first respondent's appeal was struck out it meant that the summary judgment given by the High Court against the first respondent still remained. Thus, the second respondent's liability as the guarantor for the first respondent also remained by virtue of s 81 of the Contracts Act 1950. The suit by the appellant against the second respondent as the guarantor was therefore valid (see paras 13 & 23); *Ginlon (M) Sdn Bhd v MBf Finance Bhd* [2004] 2 MLJ 646 followed.
- E (3) The question whether the appellant could carry on Islamic banking or not did not arise. The simple fact was that the first respondent received a large sum of money from the appellant and then defaulted in its repayment. Both the first and second respondents were well aware of their respective contractual responsibilities and liabilities in the event of default of repayment. There was no triable issue arising from the appellant's claim against the second respondent. The appellant was properly authorised to carry on its Islamic banking according to the minutes of the meeting of its board of directors and also the minutes of the meeting of the Majlis Pengawasan Syariah. Therefore the question posed was answered in the negative (see paras 24–26).
- F
- G
- H **[Bahasa Malaysia summary]**
- I Perayu/plaintif memberikan kemudahan pinjaman pusingan berikutan kemudahan perbankan Islam *al-Tarkhis* (prinsip *Bai al-Innah*) kepada responden pertama dan responden kedua sebagai penjaminnya. Responden pertama gagal membayar balik dan perayu memulakan tindakan terhadap responden-responden bagi mendapatkan semula jumlah pinjaman tersebut. Perayu memperoleh penghakiman terus di Mahkamah Tinggi terhadap kedua-dua responden. Responden-responden merayu ke Mahkamah Rayuan. Mahkamah Rayuan menolak rayuan responden pertama memandangkan responden pertama dalam likuidasi dan keizinan mahkamah tidak lagi

diperolehi untuk meneruskan dengan rayuan itu. Rayuan responden kedua dibenarkan atas alasan-alasan bahawa terdapat isu yang perlu dibicarakan berkenaan sama ada perayu mempunyai kapasiti dari segi undang-undang untuk menjalankan perniagaan perbankan Islam. Mahkamah Rayuan menggunakan Akta Institusi Kewangan Pembangunan 2002 yang menghalang perayu menjalankan perniagaan perbankan Islam sebelum mendapat keizinan bertulis daripada Bank Negara. Hakim Mahkamah Tinggi yang bijaksana walau bagaimanapun mendapati bahawa operasi perayu menggunakan prinsip-prinsip Syariah adalah teratur dan menurut resolusi lembaga pengarah perayu seperti yang diperuntukkan di bawah Akta Bank Kerjasama Rakyat Malaysia Berhad (Peruntukan Khas) 1978 ('Akta 202'). Keizinan telah diberikan kepada perayu untuk merayu ke Mahkamah Persekutuan atas persoalan perundangan berikut: sama ada responden kedua sebagai penjamin boleh membangkitkan semula isu-isu yang telah diputuskan oleh Mahkamah Tinggi terhadap responden pertama sebagai peminjam sementara penghakiman terhadap responden pertama dikekalkan oleh Mahkamah Rayuan dan seterusnya responden kedua tidak dan tidak pernah mencabar perjanjian jaminan yang ditandatangani.

Diputuskan, membenarkan rayuan dengan kos:

- (1) Operasi perayu menggunakan konsep Syariah adalah teratur dan menurut resolusi lembaga pengarahnya, seperti yang diperuntukkan di bawah Akta 202 (lihat perenggan 12).
- (2) Memandangkan rayuan responden pertama ditolak, ini bermaksud bahawa penghakiman terus yang diberikan oleh Mahkamah Tinggi terhadap responden pertama masih kekal. Oleh itu, liabiliti responden kedua sebagai penjamin kepada responden pertama juga kekal berikutan s 81 Akta Kontrak 1950. Guaman oleh perayu terhadap responden kedua sebagai penjamin oleh itu sah (lihat perenggan 13 & 23); *Ginlon (M) Sdn Bhd v MBf Finance Bhd* [2004] 2 MLJ 646 diikuti.
- (3) Persoalan sama ada perayu boleh menjalankan perbankan Islam atau tidak, tidak timbul. Ringkasnya di sini ialah bahawa responden pertama telah menerima sejumlah wang yang banyak daripada perayu dan kemudiannya gagal membayar balik. Kedua-dua responden amat maklum terhadap kewajipan dan liabiliti kontraktual masing-masing jika gagal membuat bayaran. Tiada isu yang boleh dibicarakan berbangkit daripada tuntutan perayu terhadap responden kedua. Perayu diberi kuasa untuk menjalankan perbankan Islam menurut minit mesyuarat lembaga pengarahnya dan juga minit mesyuarat Majlis Pengawasan Syariah. Oleh itu, persoalan yang diajukan dijawab dalam negatif (lihat perenggan 24 & 26.)

A Notes

For cases on banking, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7119–7121.

For cases on guarantee, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2139–2184.

B

For cases on Islamic banking, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1952–1954.

Cases referred to

C *Ginlon (M) Sdn Bhd v MBf Finance Berhad* [2004] 2 MLJ 641, CA (folld)

Legislation referred to

Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978 s 14(g)

D

Companies Act 1965 s 226(3)

Contracts Act 1950 s 81

Development Financial Institution Act 2002 s 129(1)

Rules of the High Court 1980 O 14

E

Appeal from: Civil Appeal No W-02–298 of 2003 (Court of Appeal, Putrajaya)

Khairuddin bin Abdul Ghani (John Clark with him) (Amir Rubana & Khairuddin) for the appellant.

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K Sinniah (AI Nathan) for the respondents.

Hashim Yusoff FCJ (delivering judgment of the court):

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[1] On 18 May 2009 this court gave leave to appeal to the appellant on the following question of law:

Whether the second respondent as a guarantor could again raise issues decided by the High Court against the first respondent as the borrower whereas judgment against the first respondent was maintained by the Court of Appeal and furthermore the second respondent did not and has never challenged the guarantee agreement signed.

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[2] We allowed the appeal and now give our reasons.

I

BACKGROUND

[3] The appellant (plaintiff) filed a suit in Kuala Lumpur High Court against the first respondent as the borrower (principal debtor) and the second

respondent as the guarantor for a claim of RM30,983,718.53 as at 20 October 1998 pursuant to an Islamic banking facility of *al-Tarkbis* (*Bai-al-Inah* principle). A

[4] The first and second respondent entered memorandum of appearance on 8 January 1999. B

[5] The appellant thereafter filed an application for summary judgment on 4 February 1999 pursuant to O 14 of the Rules of the High Court 1980 ('RHC'). C

[6] The hearing proceeded on affidavits filed therein and the application was dismissed before the senior assistant registrar but on appeal to the judge in chambers, the said appeal was allowed and summary judgment was entered against both the first and second respondents. The grounds of judgment by the learned High Court judge appeared at pp 45–58 of the record of appeal (I). D

[7] Both respondents filed an appeal to the Court of Appeal on 12 May 2003 and on the grounds as appeared in the memorandum of appeal dated 12 May 2003 at pp 32–35 of the rekod rayuan (I). E

[8] On 15 May 2008, the Court of Appeal struck out with costs the first respondent's appeal as it was in liquidation since 5 October 2005 and had not obtained leave of court in compliance with s 226(3) of the Companies Act 1965, to proceed with the appeal. But the Court of Appeal allowed the second respondent's appeal. Hence this appeal before us. F

[9] Learned counsel for the appellant submitted that the Court of Appeal in allowing the second respondent's appeal decided on only one issue ie: G

Whether at the date of the facility was granted to the first respondent in August 1997, the plaintiff (appellant) could lawfully grant the facility under Islamic banking principles when the plaintiff was a co-operative society registered or deemed registered under the Co-Operatives Societies Act 1993 (see rekod rayuan tambahan p 6, lines 15–25). H

[10] The Court of Appeal held that this is an issue of both facts and law. As such it was a serious issue which could only be decided after witnesses had given evidence on behalf of the plaintiff as to its capacity in law to carry on Islamic banking business. I

[11] In arriving at its decision the Court of Appeal had relied on the Development Financial Institution Act 2002 ('Act 618') whereby the

- A appellant was, inter alia, one of the financial institutions listed in the schedule of the order. As such the appellant is also governed by Act 618, which under s 129(1) of the same Act, prohibits a prescribed institution from carrying any Islamic banking business or Islamic financial business before obtaining the prior written approval of the Central Bank of Malaysia. Therefore the Court of Appeal held that it was not a simple and obvious case because there were issues to be tried.

- [12] Learned counsel for the appellant submitted that the Court of Appeal had erred in applying Act 618. As was held by the High Court, the appellant came under and was bound by the provisions of the Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978 ('Act 202') and the by-laws under Act 202. The learned High Court judge found as a fact that the appellant's operation using the Shariah principles were in order and in accordance of the appellant's board of directors' resolution as provided under Act 202.

- [13] He further submitted that since the appeal of the first respondent as the principal borrower/debtor was struck out, it meant that the judgment of the High Court against it still stands. This also meant that the second respondent, as the guarantor for the first respondent, remains liable for the debt. Reference was made to s 81 of the Contracts Act 1950 which provides:

- The liability of the surety is co-extensive with that of the principle debtor, unless it is otherwise provided by the contract.

- [14] In the case of *Ginlon (M) Sdn Bhd v MBf Finance Berhad* [2004] 2 MLJ 641, Abdul Aziz Mohammad JCA (as he then was) opined regarding s 81 of the Contracts Act 1950 as follows:

- ... that is a contract of guarantee. The remedy of the person to whom the guarantee is given is therefore to sue the surety on his undertaking in the contract of guarantee, if the third person defaults.

- [15] The submission of learned counsel for the second respondent is basically an attempt to defeat the appellant's claim by saying that the appellant was not authorised to carry on Islamic banking. He referred to s 14(g) of the Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978 ('Act 202') which provides:

- 14(1) In addition to the powers, functions, duties, and responsibilities conferred or imposed on the Bank by the Ordinance, the rules made thereunder, and the by-laws of the Bank, the Bank may —

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) carry on any other business expressly authorized by the Minister with the concurrence of the Minister of Finance.

[16] It was his submission that Act 202 did not mention that Bank Rakyat could carry on Islamic banking.

[17] He further submitted that in an O 14 application for summary judgment, an applicant would have to show that it is a plain and obvious case.

COURT'S FINDING

[18] There is no dispute that, at the first respondent's request the appellant gave a revolving credit facility of RM20m and that the second respondent had stood as a guarantor for the said facility (see the appeal record 221 exh ABO4).

[19] Clause 17 of the guarantee provides for the continuing liability of the guarantor as follows:

CONTINUING LIABILITY OF GUARANTOR

The obligations of the Guarantor hereunder shall not be discharged except by performance and then only to the extent of such performance. Such obligations shall not be subject to any prior notice to or demand to the Guarantor with regard to any default of the Customer and shall not be impaired by any extension of time forbearance or concession given to the Customer or any assertion or failure of any security created by or in pursuance of the Security Documents and or any modification or amplification of the provisions thereof contemplated by the terms thereof or any failure of the Customer to comply with any requirements of any law regulations or order in Malaysia or of any political subdivision or agency thereof.

[20] It is also common ground that the first respondent defaulted in its repayment. Hence the suit by the appellant against the second respondent being the first respondent's guarantor for the said facility.

A [21] It is the finding of the High Court that although the appellant was not
a company under the provisions of the Companies Act 1965, it did not mean
that it could not carry on Islamic banking operation. The learned High Court
judge found as a fact that the appellant's operation using the Shariah concept
was in order as it was in accordance with the resolution of its board of
B directors, as specially provided under the Act 202.

[22] The Court of Appeal in striking out the appeal of the first respondent
which was the principal borrower/debtor however allowed the appeal by the
second respondent who was the guarantor for the first respondent, on the
C grounds that the appellant's capacity to give the revolving credit to the first
respondent was a serious issue of fact and law that needed to be tried by the
calling of witnesses.

D [23] With respect, we cannot agree with the reasoning given by the Court
of Appeal. Since the first respondent's appeal was struck out it meant that the
O 14 summary judgment given by the High Court against the first
respondent, still remains. It follows that the second respondent's liability as
the guarantor for the first respondent also remains, by virtue of s 81 of the
E Contracts Act 1950. The suit by the appellant against the second respondent
as the guarantor is therefore valid, following the decision of the Court of
Appeal in the case of *Ginlon (M) Sdn Bhd v MBf Finance Berhad*.

F [24] The question whether the appellant could carry on Islamic banking or
not does not arise. The simple fact is that the first respondent received a large
sum of money from the appellant and then defaulted in its repayment. The
second respondent was also sued by the appellant based on his guarantee for
the said revolving credit. Both the first and second respondents were well
G aware of their respective contractual responsibilities and liabilities in the event
of default of repayment.

H [25] From the evidence available, we do not see any triable issue arising
from the appellant's claim against the second respondent. We also agree with
the learned High Court judge that the appellant was properly authorised to
carry on its Islamic banking according to the minutes of the meeting of its
board of directors dated 29 April 1993 (see the appeal record 344 exh ABO37
and also the minutes of the meeting of the Majlis Pengawasan Syariah Bil
2/94 dated 29 November 1994 which clearly stated their approval to the
overdraft facility according to Shariah concept of *Bai-al-Inah* which was
I named as *al-Tarkhis (Istimewa)* facility.

[26] For the above reasons we would answer the question posed, in the negative. The appeal by the second respondent is allowed with costs fixed at RM20,000 for the appellant. The order of the High court is restored. Deposit is to be given to the appellant towards costs.

Appeal allowed with costs.

Reported by Kanesh Sundrum

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