Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd and another suit

HIGH COURT (KUALA LUMPUR) — SUIT NOS D4–22A-216 OF 2007 AND D4–22A-227 OF 2007
ROHANA YUSUF J
21 AUGUST 2009

Banking — Banks and banking business — Islamic banking — Murabaha facility agreements restructured into revolving al-Bai Bithaman Ajil facility — Default in repayment — Whether plaintiff agreed to be bound by terms of agreement — Whether bank entitled to sell pledged shares — Whether principles of Shariah complied with

Contract — Agreement — Facility agreement — Murabaha facility agreements restructured into revolving al-Bai Bithaman Ajil facility — Default in repayment — Whether bank entitled to sell pledged shares — Whether collateral agreement contradicted facility agreement

The relationship between the parties begun when the bank ('the defendant') provided two murabaha facilities to the plaintiff, to redeem and acquire more shares in a company called 'Kumpulan Guthrie Berhad'. The plaintiff defaulted under the agreements and sought deferment of payment of the outstanding (exhs MR3 and MR5). Due to repeated breaches by the plaintiff, the bank offered to restructure the murabaha facilities to assist him in meeting his outstanding obligations to the bank and the two murabaha facilities were restructured into a revolving al-Bai Bithaman Ajil facility ('BBA facility agreement'). However the plaintiff defaulted in the first instalment under the BBA facility agreement and hence, this suit in encl 5 by the bank to enter a summary judgment under O 14 of the Rules of the High Court 1980 for a sum of USD18,521,806.13 or its equivalent in Ringgit Malaysia. The plaintiff, did not dispute the default or the amount outstanding, instead alleged an existence of collateral agreement and attempted to challenge the validity of the BBA facility agreement on various grounds, inter alia, for want of compliance with the principles of Shariah.

Held, allowing the application with costs:

(1) The terms of the alleged collateral agreement were directly in

contradiction with the terms under the BBA facility agreement. The allegation of an existence of a collateral agreement by the plaintiff also seemed implausible in view of the two letters in MR3 and MR5 seeking indulgence from the bank for deferment of payment. The two letters could not be anything less than admission by the plaintiff of his liabilities under the murabaha agreements, which had been restructured. The evidence of negotiations, if any, prior to the restructuring of the BBA facility agreement were not evidence that the court could admit in view of ss 91 and 92 of the Evidence Act 1950, as they directly contradicted the express written provisions of the BBA facility agreement (see para 9).

(2) Questioning of the validity of an agreement after benefiting from it and upon default, in itself lacks bona fide as the plaintiff was in the position to obtain any Shariah or legal advice at the time he entered into the agreements with the bank. To turn around and challenge the validity of an agreement entered voluntarily after reaping the benefit under it appeared to be a mere afterthought (see para 13).

(3) Since there were differences in Shariah views, parties may generally enter into an agreement based on any particular view or opinion and they are bound by the contracting terms based on that particular Shariah position. In this case, the plaintiff had agreed with the bank to be bound by the BBA terms as per the written terms between them and it was not open to him to now say that the BBA terms should have been interpreted and implemented differently. Whilst there is a whole host of Shariah rule that must be complied with in this transaction, it must be pointed out that there is another side to fulfilling contractual obligations in the eyes of the Shariah. The demand on a person to fulfill contractual obligations in Shariah is an onerous one (see paras 19 & 22); *Bank Kerjasama Rakyat Malaysia Berhad v PSC Naval Dockyard Sdn Bhd* [2008] 1 CLJ 745 followed.

(4) There was no clause in the agreement that required the bank to seek the plaintiff's consent to sell the pledged shares neither was there any clause that the parties were entering into the agreement based on the principle of ar-Rahnu. What was clear was that the documents were drawn to grant custody to hold the pledged shares where the bank had full access and authority to sell them to cover outstanding due by the plaintiff (see para 23).

[Bahasa Malaysia summary

Hubungan antara pihak-pihak bermula apabila pihak bank ('defendan') menyediakan dua kemudahan murabaha kepada plaintif, bagi menebus dan memperoleh lebih banyak saham dalam sebuah syarikat yang dipanggil

'Kumpulan Guthrie Berhad'. Plaintif mungkir di bawah perjanjian-perjanjian tersebut dan meminta penangguhan pembayaran tertunggak (eksh MR3 dan MR5). Oleh kerana kemungkiran berulang kali oleh plaintif, bank telah menawarkan untuk menstruktur semula kemudahan-kemudahan murabaha untuk membantunya dalam memenuhi kewajipan-kewajipan tertunggaknya kepada bank dan kedua-dua kemudahan murabaha distruktur semula menjadi satu kemudahan al-Bai Bithaman Ajil ('perjanjian kemudahan BBA'). Walau bagaimanapun plaintif gagal dalam pembayaran ansuran pertama di bawah perjanjian kemudahan BBA tersebut dan oleh itu, guaman ini dalam lampiran 5 oleh bank untuk memasukkan satu penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk satu jumlah sebanyak USD18,521,806.13 atau sama nilainya dalam Ringgit Malaysia. Plaintif, tidak mempertikaikan keingkaran atau jumlah yang tertunggak, sebaliknya mendakwa kewujudan perjanjian kolateral dan mencabar kesahihan perjanjian kemudahan BBA atas beberapa alasan, antara lain, ketidakpatuhan dengan prinsip-prinsip Syariah.

Diputuskan, membenarkan permohonan dengan kos:

(1) Terma-terma perjanjian kolateral yang didakwa itu adalah secara langsung bertentangan dengan syarat-syarat di bawah perjanjian kemudahan BBA. Dakwaan mengenai kewujudan satu perjanjian kolateral oleh plaintif juga kelihatan tidak masuk akal memandangkan dua surat dalam MR3 dan MR5 memohon jasa baik daripada bank untuk penangguhan pembayaran. Kedua-dua surat itu merupakan pengakuan plaintif mengenai liabilitinya di bawah perjanjian-perjanjian murabaha, yang telah distruktur semula. Bukti rundingan-rundingan, jika ada, sebelum penstrukturan semula perjanjian kemudahan BBA bukanlah bukti yang mahkamah boleh terima di bawah ss 91 dan 92 Akta Keterangan 1950, kerana ia secara langsung bertentangan dengan peruntukan-peruntukan bertulis nyata perjanjian kemudahan BBA (lihat perenggan 9).

(2) Mempersoalkan kesahihan satu perjanjian selepas mendapat faedah daripadanya dan apabila ingkar, telah hilang ciri bona fide kerana plaintif boleh memperoleh nasihat Syariah atau perundangan pada masa dia menandatangani perjanjian-perjanjian dengan bank. Untuk berpatah balik dan mencabar kesahihan satu perjanjian yang ditandatangani secara sukarela selepas memperoleh manfaat daripadanya kelihatan seperti sesuatu yang difikirkan kemudian semata-mata (lihat perenggan 13).

(3) Memandangkan terdapat perbezaan dalam pendapat-pendapat Syariah, pihak-pihak boleh secara umumnya menandatangani satu perjanjian berdasarkan mana-mana pandangan atau pendapat tertentu dan mereka

adalah terikat oleh syarat-syarat kontrak berdasarkan pandangan Syariah tersebut. Dalam kes ini, plaintif telah bersetuju dengan bank untuk terikat dengan terma-terma BBA seperti terma-terma bertulis antara mereka dan sekarang dia tidak boleh mengatakan bahawa terma-terma BBA seharusnya telah ditafsirkan dan dilaksanakan secara berbeza. Meskipun terdapat sejumlah besar undang-undang Syariah yang mesti dipatuhi dalam transaksi ini, ia mesti dinyatakan bahawa terdapat bahagian lain untuk memenuhi tanggungjawab-tanggungjawab kontraktual dalam pandangan Syariah. Desakan bagi seseorang untuk memenuhi tanggungjawab-tanggungjawab kontraktual dalam Syariah adalah sesuatu yang berat (lihat perenggan 19 & 22); *Bank Kerjasama Rakyat Malaysia Berhad v PSC Naval Dockyard Sdn Bhd* [2008] 1 CLJ 745 diikut.

(4) Tidak ada klausa di dalam perjanjian tersebut yang memerlukan bank untuk mendapatkan persetujuan plaintif bagi menjual saham-saham yang dicagarkan mahupun terdapat sebarang klausa yang pihak-pihak menandatangani perjanjian tersebut berdasarkan prinsip ar-Rahnu. Apa yang jelas adalah dokumen-dokumen itu telah disediakan bagi memberi penjagaan untuk memegang saham-saham yang dicagarkan di mana bank mempunyai akses penuh dan kuasa bagi menjualnya untuk menampung jumlah tertunggak plaintif (lihat perenggan 23).]

Notes

For cases on facility agreement, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2426–2428.

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

Cases referred to

Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party) [2008] 5 MLJ 631; [2009] 1 CLJ 419, HC (refd)

Bank Islam Malaysia v Adnan bin Omar [1994] 3 CLJ 735, HC (refd)

Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd [2003] 2 MLJ 408; [2003] 1 CLJ 625, CA (refd)

Bank Kerjasama Rakyat Malaysia Bhd v PSC Naval Dockyard Sdn Bhd [2008] 1 CLJ 784, HC (folld)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (folld)

Noh Hyoung Seok v Perwira Affin Bhd [2004] 2 MLJ 203; [2004] 2 CLJ 64, CA (refd)

SM Appaduray & Anor v R Ananda & Anor [1982] 1 MLJ 292, HC (refd)

Tan Swee Hoe Co Ltd v Ali Hussain Bros [1980] 2 MLJ 16, FC (refd)

Legislation referred to

Central Bank of Malaysia Act 1958 s 16B, 16B(2), (7), (8)
Contracts Act 1950 s 24
Evidence Act 1950 ss 91, 92
Islamic Banking Act 1983 s 2
Rules of the High Court 1980 O 14

Malik Imtiaz Sarwar (Mathew Thomas Philip with him) (Thomas Philip) for the plaintiff.
Tommy Thomas (Ganesan Nethi with him) (Tommy Thomas) for the defendant.

Rohana Yusuf J:

[1] There are two legal suits involving the parties. One is a claim by Bank Islam Malaysia Bhd against Tan Sri Abdul Khalid bin Ibrahim ('Tan Sri Khalid') in Suit No D4–22A-227 of 2007 and the other is a claim by Tan Sri Khalid against the Bank in Suit D4–22A-216 of 2007. Both suits are now consolidated. Pursuant to Suit No 22A-227 of 2007 this application in encl 5, by Bank Islam Malaysia Bhd is made under O 14 of the Rules of the High Court 1980.

[2] The original parties to the agreements are Tan Sri Khalid and Bank Islam (L) Ltd Malaysia Bhd vide a vesting order dated 14 February 2006, all rights and obligations of Bank Islam (L) Ltd were transferred to and vested in Bank Islam Malaysia Bhd. Both Bank Islam (L) Ltd and Bank Islam Malaysia Bhd will hereafter be referred to interchangeably, as 'the bank'.

BACKGROUND FACTS

[3] The relationship between the parties begun when the bank provided two murabaha facilities to Tan Sri Khalid, to redeem and acquire more shares in a company called 'Kumpulan Guthrie Bhd'. Tan Sri Khalid failed to pay the first instalment under the first murabaha facility agreement which was due on 24 October 1998. He sought a deferment of payment of the outstanding vide a letter dated 16 October 1998 (exh MR3). He also defaulted under the second murabaha agreement when he failed to pay the first instalment thereunder and sought a deferment of payment vide a letter dated 20 October 1999 (exh MR5).

RESTRUCTURING

[4] Due to repeated breaches by Tan Sri Khalid, the bank offered to restructure the murabaha facilities to assist him in meeting his outstanding obligations to the bank. Tan Sri Khalid agreed to the restructuring when he

accepted the offer of the bank dated 17 April 2001 in exh MR6. By that acceptance, the two murabaha facilities were restructured into a revolving al-Bai Bithaman Ajil facility ('BBA facility agreement'). The BBA facility agreement comprises the following documents:

(a) Letter of offer to restructure murabaha facilities dated 17 April 2001 (in exh MR6).

(b) Memorandum of acceptance by Tan Sri Khalid (in exh MR6).

(c) Master revolving BBA facility (BBA agreement) (in exh MR7).

(d) Memorandum of charge over shares dated 30 April 2001 (in exh MR8).

(e) Fund administration and custodian agreement (in exh MR9).

The salient terms of the BBA facility agreement are as follows.

(a) The bank purchases from Tan Sri Khalid 39,681.562 shares of Kumpulan Guthrie ('Guthrie shares') for USD56,500,000.

(b) The bank resells the shares to Tan Sri Khalid at a sale price to be determined on the basis of the cost of funds plus 0.75%.

(c) At every six monthly intervals, the parties will have to execute an asset sale agreement ('ASA') and an asset purchase agreement ('APA') in respect of the Guthrie shares in the specified form.

(d) The sale price is to be paid in instalments by Tan Sri Khalid, and the first instalment being payable six months from the date of each asset sale agreement and the second instalment, six months thereafter.

(e) The bank has the mandate and absolute discretion to sell all or part of the Guthrie shares pledged to it as security in satisfaction of sums due.

(f) The bank reserves the right to instruct Tan Sri Khalid to top-up or to increase the security in respect of the facility at any time.

(g) Default of payment on due dates and inadequate security give the bank the right to declare that the indebtedness is due and payable by Tan Sri Khalid and to enforce the BBA facility agreement.

[5] Tan Sri Khalid defaulted the first instalment under the restructured BBA facility agreement and hence, this suit. In encl 5, the bank is applying to enter a summary judgment for a sum of USD18,521,806.13 (as at 13 November 2006) or its equivalent in ringgit Malaysia.

[6] Tan Sri Khalid did not dispute the default or the amount outstanding. He instead, alleged an existence of collateral agreement and attempted to

challenge the validity of the BBA facility agreement on various grounds.

COLLATERAL AGREEMENT

[7] First, learned counsel for Tan Sri Khalid, Encik Malik Imtiaz Sarwar (Encik Matthew Thomas Phillip with him) contends that there exists a collateral agreement between the parties orally and by conduct. He contends that; it was the intention of the parties to avail Tan Sri Khalid to take up 20% shares in Guthrie within ten years following an option given to him by Perbadanan Nasional Bhd; that the tenure of BBA facility agreement would be for a period of ten years and the principal amount would only be due for payment by 2011; the half yearly profits due to the bank under the BBA facility agreement would be satisfied through the transfer of shares by Tan Sri Khalid to the bank and by an allocation of dividends from transferred shares to the bank to allow the facility to be seen as performing; no payment needed to be made by Tan Sri Khalid and the BBA facility agreement will be rolled over at the end of every six months as a matter of course. It was also contended that there was no request made by the bank for Tan Sri Khalid to top-up securities although the transfer of his shares to the bank had progressively reduced the security coverage. Finally it was contended that the relation between parties must be viewed as a partnership of mutual benefit, in a win-win situation upon the ultimate sale of the Guthrie shares. The BBA facility agreement must therefore be viewed in the context of all these collateral promises.

[8] In response, learned counsel for the bank Encik Tommy Thomas (Encik Ganesan Nethiganantarajah with him) submits that the intention of the parties are clearly spelled out in the BBA facility agreement and parties entered into these agreements with the intention to be bound by their respective terms, and nothing more. Relying on these terms the bank disbursed USD56,500,000 to refinance monies owing under the earlier two murabaha agreements. The bank took a gradual disposal of the pledged shares to recoup payments in respect of the amount owing to the bank by Tan Sri Khalid. The proceeds of sale of part of the pledged Guthrie shares are shown in the statement of account in exh MR24. Resulting from this, the amount of the pledged Guthrie shares had decreased, and the bank vide exh MR25 demanded Tan Sri Khalid to furnish further securities. Tan Sri Khalid failed to top up. The bank issued notice of 18 July 2005 (in exh MR26) for him to remedy his default, but received no response. Another notice was issued by the bank dated 4 August 2005 (in exh MR27) when the first notice was not complied.

[9] I will now deal with the issue on collateral agreement. I note that the terms of the alleged collateral agreement are directly in contradiction with the

terms under the BBA facility agreement, though they may have been part of negotiations prior to the acceptance of restructuring. The allegation of an existence of a collateral agreement by Tan Sri Khalid also seems implausible in view of the two letters in MR3 and MR5 seeking indulgence from the bank for deferment of payment. I agree with the contention of Encik Tommy Thomas that these two letters cannot be anything less than admission by Tan Sri Khalid of his liabilities under the murabaha agreements, which is now restructured. The evidence of negotiations if any, prior to restructuring of the BBA facility agreement are not evidence that this court can admit in view of ss 91 and 92 of the Evidence Act 1950, as they directly contradict the expressed written provisions of the BBA facility agreement.

[10] Under s 91, when the terms of a contract have been reduced to the form of document, no evidence shall he given to prove the terms of the contract, except that it should be construed within the four corners of the document itself. Under s 92, no oral evidence or statement can be admitted for the purpose of contradicting, varying, adding to or subtracting the written terms. Encik Malik Imtiaz cites in authority the Federal Court case of *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16, to support his contention that oral promises can be taken into account, and assurances given in the course of negotiation may give rise to a contractual obligation. In that same case a question was posed as to why oral promise which parties place so much importance on are not written into the agreement. In response the Federal Court acknowledges the need for the law to accommodate the ordinary people and not to expect response of astute businessman in all cases. However, such leaning in favour of the ignorant or innocent cannot apply in this case as it is a known fact that Tan Sri Khalid is an experienced and astute businessman. He was then the chief executive officer of Guthrie Bhd and now the Menteri Besar of Selangor. It is too preposterous to expect a person of such standing to rely on oral promises which contradict the agreements he signed freely and voluntarily. He surely must have understood and was fully aware of the implications of what he signed. This is not an appropriate case where a party to a contract can be said to have relied on oral promises that run contradictory to what he has agreed in a written document. To use oral evidence to contradict his written obligations under an agreement or to allow extrinsic evidence be used to contradict or avoid obligations under the written agreements will run foul of s 91 of the Evidence Act. Even if there is any indulgence granted by the bank, it cannot be interpreted to create a partnership between them. The allegation of an existence of a collateral agreement, and that he relied upon them in my view are highly improbable, given the circumstances.

ILLEGALITY

[11] Tan Sri Khalid challenged the validity of the BBA facility agreements

for want of compliance with the principles of Shariah. Encik Malik Imtiaz for Tan Sri Khalid contends that the BBA facility agreement is contrary to principles of Islam due to the following three main reasons. First, the BBA facility agreement either read together with the security documents or even independently will denote that they are financing arrangement and not sale transaction as they purport to be. Secondly, the BBA facility agreement become *'bay al-inah'* as the recital of the agreement shows there is connection between the asset purchase agreement ('APA') and asset sale agreement ('ASA'). Thirdly, the disposal of the pledged Guthrie shares by the bank without notifying Tan Sri Khalid is contrary to Islamic principle known as *'al-Rahnu'* which requires consent of pledgees. Consequently he submitted that the BBA agreement is contrary to law or public policy and cannot be enforced under s 24 of the Contracts Act 1950.

[12] According to him, though being challenged on the Shariah compliant, the bank did not produce opinion to the contrary nor any approval from the bank's Shariah Supervisory Council. He submits that expert opinion is required to determine the issue at hand. He cites the case of *SM Appaduray & Anor v R Ananda & Anor* [1982] 1 MLJ 292. In that case, the learned High Court judge observed that, where the court is not in a position to form a correct judgment without the help of persons who have acquired special skill or experience on a particular subject, the court should not allow summary judgment. This is because the weight of the expert opinion can only be tested at a trial as it would be challenged on its accuracy. He produced three Shariah opinions which essentially raise issues with BBA agreement in the eyes of Shariah. Such, and in view of the complexities of both facts and law he contends that this case merits a trial. This is because under an O 14 application, the court need only consider whether or not there are issues to be tried but not to delve into their merits as stated in *Noh Hyoung Seok v Perwira Affin Bhd* [2004] 2 MLJ 203; [2004] 2 CLJ 64. In *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 it is stated that, since the effect of O 14 is to shut the defendant from having his day in the witness box it should only be invoked in cases where there is no bona fide triable issue.

[13] Following the well established principle in *Ng Hee Thong* it must be borne in mind that the triable issue raised in resisting an O 14 application must be bona fide. The issue before me is therefore whether the challenge on the validity of the BBA facility agreement is a bona fide triable issue. In my view, questioning of the validity of an agreement after benefiting from it and upon default, in itself lacks bona fide. I say this because Tan Sri Khalid was in the position to obtain any Shariah or legal advice at the time he entered into these agreements with the bank. To turn around and challenge the validity of an agreement entered voluntarily after reaping the benefit under it appears to be a mere afterthought. This is also akin to a case of a muslim who

goes into a restaurant, had a meal, only to inquire after the meal if the food is non-halal and when told that is so, refuses to pay for it. Such conduct cannot reflect a serious concern of the Shariah compliance, but more of an attempt to renege contractual obligations which have been voluntarily agreed and acted upon by the other party.

[14] Be that as it may, it would be necessary to analyse the issue raised on this point. Encik Malik Imtiaz submits three Shariah opinions, one by Dr Ugi Suharto (in exh AK1-16), an Assistant Prof Department of Economics of the International Islamic University Malaysia (IIUM) another, from Dr Aznan bin Hassan, (in exh AK1-55) an Assistant Prof of Kuliyyah of Laws IIUM and another, from Mr Mohd El Faith Hamid (exh MEL1), a fellow (Professor) at the University of Khartoum. Essentially all these opinions question the validity of the BBA agreement under the Shariah. Encik Malik Imtiaz contends that since the BBA agreement is not in line with Islamic law the BBA agreement is an illegal contract or agreement against public policy and are null and void under s 24 of the Contracts Act 1950.

[15] I would like first to appraise myself with the legislative provision that deals with this issue as found in s 16B of the Central Bank of Malaysia Act. Section 16B creates the Shariah Advisory Council ('SAC') under the aegis of the Bank Negara Malaysia ('Bank Negara'). Section 16B designates the SAC to be the authority for the *ascertainment of Islamic law for the purposes of Islamic banking business, takaful business or Islamic financial business*. Bank Negara, under s 16B(7) must consult the SAC on Shariah matters relating to Islamic banking business, takaful business, Islamic financial business, Islamic development financial business, or any other business which is based on Shariah principles. Bank Negara, may issue written directives to banks and financial institutions in relation to Islamic banking or Islamic financing businesses in accordance with the advice of the SAC. Its membership as determined under s 16B(2) is made of members from related disciplines, besides Shariah scholars. Looking at s 16B(7), I would not be wrong to assume that when Bank Negara issues directives involving Shariah matter it would have the approval or the advice of the SAC. Thus an approval of Bank Negara for financial institutions to offer Islamic banking products would and must have had the benefit of the advice of the SAC. I raise this point also because in the submission of Encik Tommy Thomas for the bank, he confirmed that the restructuring of this particular BBA facility agreement received the sanction of Bank Negara, which in return would have had the benefit of the SAC's advice.

[16] Under s 16B(8), it is provided that in any proceedings before the court when a question arises concerning a Shariah matter, the court or the arbitrator may take into consideration any written directives issued pursuant

to sub-s (7) or refer such question to the SAC for its ruling. Relying on this clause in fact, after the submissions was made before me by both counsel on the Shariah issue raised; I had caused an enquiry to be made to the SAC as to whether a ruling has been made on the status of BBA agreement. The secretariat to SAC responded with a written ruling from the SAC which states essentially, that BBA agreement is acceptable and a recognised transaction in Islam. I have furnished the said written ruling from the SAC to both counsel. Thereafter, counsel for Tan Sri Khalid in a letter dated 5 May 2009 seeks leave for a further submission on the Shariah issue. In a further written submission, learned counsel contends that the mode of execution of APA and ASA was improper because Tan Sri Khalid was made to sign both agreements first before they were passed back to be completed by the bank. There was therefore no separation of the APA with the ASA and no distinction in term of time of execution as required under the said ruling of the SAC. As such there was no complete sale of shares to the bank under the APA before the bank can resell shares to Tan Sri Khalid in the ASA. To my mind, this issue is based on mere technicality and a trivial one. The consensus between parties has been arrived at the point the letter of offer was accepted by Tan Sri Khalid. The agreement to be bound is subject to the formalities of the execution of various documents. Signing of the written agreements is to formalise and to translate the consensus of parties in the terms clearly agreed upon. Besides, it has always been a practice, for the borrower to affix signatures on all banking documents before the bank execute the same, and it is rather inconceivable to suggest that it can affect the validity of the contract. Furthermore, a written confirmation from the bank's own Shariah Council in exh GN4 confirmed that the mode employed for the execution of the documents in the present case is in order and has no bearing from Shariah perspective. With seven sets of APA and ASA documents signed in the same manner, the parties would have condoned and accepted such practice. As such, I fail to see how these agreements will not be binding on parties merely because they are signed without following orders of precedent, when after entering into the seven sets of transaction the defendant never protests or raises any issue.

[17] Returning now to the SAC, it is clear from s 16B that the SAC is the body empowered for the 'ascertainment of Islamic Law for the purpose of Islamic banking business…'. The Legislature had intended the SAC to be a legally recognised body under the law to ascertain the Islamic law applicable to Islamic banking and finance. With such specific legislative provision it is obvious that the SAC is a body empowered and recognised under the legislation to issue ruling and direction on the applicable Shariah law in Islamic banking business.

[18] To my mind there is good reason for having this body. A ruling made by a body given legislative authority will provide certainty, which is a much needed element to ensure business efficacy in a commercial transaction. Taking cognisance that there will always be differences in views and opinions on the Shariah, particularly in the area of muamalat, there will inevitably be varied opinions on the same subject. This is mainly due to the permissive nature of the religion of Islam in the area of muamalat. Such permissive nature is evidenced in the definition of Islamic banking business in s 2 of the Islamic Banking Act 1983 itself. Islamic banking business is defined to mean, *banking business whose aims and operations do not involve any element which is not prohibited by the Religion of Islam*. It is amply clear that this definition is premised on the doctrine of *'what is not prohibited will be allowed'*. It must be in contemplation of the differences in these views and opinions in the area of muamalat that the legislature deems it fit and necessary to designate the SAC to ascertain the acceptable Shariah position. In fact, it is well accepted that a legitimate and responsible government under the doctrine of *siasah-as-Shariah* is allowed to choose, which amongst the conflicting views is to be adopted as a policy, so long as they do not depart from al-Quran and Islamic injunction, for the benefits of the public or the ummah. The designation of the SAC is indeed in line with that principle in Islam.

[19] Having examined the SAC, its role and functions in the area of Islamic banking, I do not see the need for me to refer this issue elsewhere though I am mindful that under s 16B(7) I am not bound by its decision. From its constituents in s 16B(2) the members are made of people of varied disciplines besides Shariah scholars. This, I believe will enable the body to arrive at a well informed decision instead of deciding the Shariah issue in isolation. Bearing in mind the response from the SAC to this case, namely, that BBA is a recognised form of transaction and is within Shariah, I have no hesitation to accept that view and will not venture any further into its finding. In addition to that, I hold the view that since there are differences in Shariah views, parties may generally entered into an agreement basing on any particular view or opinion and they are bound by the contracting terms based on that particular Shariah position. In this case Tan Sri Khalid had agreed with the bank to be bound by the BBA terms as per written terms between them and it is not opened to him to now says that the BBA terms should have been interpreted and implemented differently.

[20] The issue of validity of the BBA agreements was earlier brought to court in the *Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party)* [2008] 5 MLJ 631; [2009] 1 CLJ 419. Among the issue raised was whether the BBA agreement is valid and enforceable because it is not a sale transaction as it purports to be, but a lending agreement. The Appeal Court had however, overruled that decision

and held that the BBA agreement is valid and an enforceable contract. Thus, the judgment of the High Court that BBA facility agreement is not a sale agreement but a loan agreement, an argument also put forward by Encik Malik Imtiaz in the present case has been overruled by the Court of Appeal. Unfortunately, at the point this decision is written I have not had the privileged and benefit of the written judgment of the Appeal Court, though I was appraised with the order granted by the Court of Appeal relating to the same issue, in another case that was before me.

[21] Looking back, the BBA agreement had in fact been enforced since the case of *Bank Islam Malaysia v Adnan bin Omar* [1994] 3 CLJ 735 and *Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd* [2003] 2 MLJ 408; [2003] 1 CLJ 625. In the later case, the Court of Appeal had also observed that the law applicable to an Islamic banking transaction is no different from the law given under conventional banking.

[22] Whilst counsel for the Tan Sri Khalid argued that there is a whole host of Shariah rule that must be complied with in this transaction, it must be pointed out that there is another side to fulfilling contractual obligations in the eyes of the Shariah. The demand on a person to fulfil contractual obligations in Shariah is an onerous one. I have in an earlier decision in *Bank Kerjasama Rakyat Malaysia Bhd v PSC Naval Dockyard Sdn Bhd* [2008] 1 CLJ 784 made my observation on sanctity of contract and the demand on performance of a contractual obligations in the eyes of Shariah. I do not now wish to repeat them here.

WRONGFUL SALE OF PLEDGED SHARES

[23] Two main issues were raised on the pledged shares. First, the bank was alleged to have wrongfully sold the pledged shares for failure to obtain the consent from Tan Sri Khalid. This according to Encik Malik Imtiaz is against the principle of ar-Rahnu. Under the fund administration and custodian agreement (in exh (AKI-6), the custodian of the shares is BIMSEC NOMINEES (ASING) Sdn Bhd I do not find any clause in this agreement that require the bank to seek Tan Sri Khalid's consent to sell the pledged shares. I also do not find any clause that parties are entering into this agreement based on the principle of ar-Rahnu. What is clear is that the documents are drawn to grant custody to hold the pledged shares where the bank has full access and authority to sell them to cover outstanding due by Tan Sri Khalid. The pledged shares were sold by the bank, when Tan Sri Khalid fails to remedy the breaches specified in the two notices given to him. If the bank had not enforced this security, the bank would be blamed for not exercising its right under the security documents first, before any action is taken against Tan Sri Khalid. As such, I fail to see the relevance of this

argument when Tan Sri Khalid had already agreed to give the bank his full mandate to sell off the pledged share to remedy his outstanding.

[24] The sale of the pledged Guthrie shares was carried out through CIMB Investment Bank Bhd which assisted the bank in monitoring the daily market condition to ensure efficient sale price. Encik Malik Imtiaz suggested possible impropriety on the part of CIMB who possessed knowledge of the impending merger of Guthrie Bhd and other companies which resulted in the Synergy Drive Sdn Bhd. I find this argument too speculative. The bank has no relation with Synergy Drive Sdn Bhd. CIMB is a bank regulated under Bank Negara's supervision and any malpractices of CIMB would have come under close scrutiny of Bank Negara or the Securities Commission. In any event, there is no evidence of such impropriety shown to this court to support that suggestion. Issue was also raised on the method of valuation adopted in the initial sale price of Guthrie shares set out in the first ASA (exh MR10) under the BBA facility agreement which was not fixed to the current market price of the Guthrie shares. The prevailing market price was RM1.80 per share, resulting in USD19,000,000 in value. However the bank had 'over valued' them in line with outstanding by Tan Sri Khalid which was USD56,500,000. If the bank had followed the market price it would mean that Tan Sri Khalid would have to pay the differences then besides it would result in continuous fluctuation in the amount due to the bank. This would have affected the whole business efficacy in the process.

ADMISSION

[25] Having considered all these arguments, one fact remains clear. Tan Sri Khalid had on a number of occasions admitted his liability to repay the amount due under both murabaha agreements and the BBA facilities agreement. As I have referred to earlier, his letters in exh MR3 and MR5 seeks to defer payment under the both murabaha agreements. The memorandum of acceptance in MR6 signed by Tan Sri Khalid admitted him owing the bank under the earlier murabaha agreements. Exhibit MR6 provides so plainly and clearly that the purpose of the restructuring agreement was to finance the existing murabaha facilities of USD50,000,000m and USD11,750,000 respectively. Finally, his letter in exh MR31, goes to show his admission on his liability. I agree with Encik Tommy Thomas that, on this ground alone, the application in encl 5 should be granted.

[26] In view of the foregoing, I do not find any bona fide triable issue raised in this application, I hereby allow the application in encl 5 with costs.

Application allowed with costs.

Reported by M Sivabarathi