Neutral Citation Number: [2009] EWHC 3545 (Ch)

Case No: CH/2009/PTA/0455

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice Strand
London WC2A 2LL

11 December 2009

B e f o r e :

HIS HONOUR JUDGE PURLE QC
(SITTING AS A JUDGE OF THE HIGH COURT)

THE INVESTMENT DAR COMPANY KSCC **Appellant**

- and -

BLOM DEVELOPMENTS BANK SAL **Respondent**

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MR NIGEL DOUGHERTY (instructed by Lathem & Watkin) appeared on behalf of the APPELLANT
MR RUPERT REED (instructed by Davis Arnold Cooper) appeared on behalf of the RESPONDENT

HTML VERSION OF JUDGMENT

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1. JUDGE PURLE QC: This is an appeal from the order of Master Bragge made on 23 July 2009 whereby he granted summary judgment to the claimant (which I shall refer to as "Blom") on part of its claim in the amount of $10,733,292.55 US. The appeal is brought with the permission of Mann J.

2. The claim arose out of various deposits, for want of a better word, made by Blom with the defendant, referred to throughout the hearing as "TID". I shall so refer to it also. The deposits were made pursuant to what was called a master wakala contract dated 11 October 2007 and individual contracts made purportedly pursuant to the terms thereof. Two claims were advanced in the Particulars of Claim, one on the contract itself, where it was alleged that default had been made in making payments due pursuant to the master wakala contract, and, secondly, a claim expressed to be based in trust, founding itself also on the terms of the master wakala contract. The master found that there was an arguable defence to the contractual claim but not to the trust claim. TID appeals and Blom seeks to uphold the decision of the master on the alternative basis that he should have got judgment on the contract claim. The judgment that the master granted was for repayment of all the principal sums advanced or deposited and not for any profit element or, as TID would have it, interest.

3. The contention between the parties rests upon matters of Sharia law. This is on the face of it surprising as the master wakala contract, and therefore all individual contracts made pursuant thereto, is expressly governed by English law. However, TID is incorporated in Kuwait. Under its memorandum of association, its objects clause is qualified by article 5 (the clauses of the Memorandum being referred to as articles). There is a dispute as to the translation of the Memorandum, but that is not a dispute that can be resolved on a summary judgment application. The translation I have seen translates the relevant word as "objective". Article 5 of the Memorandum provides:

   "The objectives for which the company is established shall be Sharia compliant. None of the objectives shall be construed and interpreted as permitting the company to practice directly or indirectly any usury or non-Sharia compliant activities. "

4. That is clearly intended to be of broad width, as the reference to "indirectly" as well as "directly" demonstrates. A series of objectives (or, as an English lawyer would say, objects) follow in article 6. They have been amended from time to time. Most significantly objective 2 states as follows:

   "Carry out all financial transactions in a Sharia compliant manner. However, in all cases, this item shall not be construed or interpreted as permitting the company to practice any activities related to banking profession, i. e. accept cash deposits, saving deposits, account opening, issuance of letters of guarantee, open documentary credits and other banking activities. "

5. In the financial statements of TID, of which I have seen a number of examples, the activities of TID and its subsidiaries are said to be carried out in accordance with noble Islamic Sharia principles and are said to be the selling and leasing of motor vehicles and real estate properties to consumers based on, amongst other sorts of contracts, wakala contracts. "Wakala" appears to mean "agency". The particular master wakala contract with which I am concerned was dated 11 October 2007 between TID and Blom. The preamble, which was expressed to be an integral part of the contract, recited that:

   "[Blom] (hereinafter referred to as the 'Muwakkil/Depositor') wishes to appoint [TID] as its Wakeel (agent) and to invest/deposit with [TID] its funds from time to time. "

6. Detailed terms followed. For all intents and purposes the commercial result is equivalent to that of a deposit at interest. A further recital was that the contract had been entered into and signed by both the parties to regulate the mechanism and procedures for accepting the muwakkil/depositor's funds by the wakeel and their investment in the treasury pool in the agreed manner and the payment of profit to the muwakkil/depositor upon completion of each wakala period. Thus the form of the contract was that of an investment by TID as agent. However, the investment was to be, as clause 2 stated expressly, "in the wakeel's treasury pool". The treasury pool was defined in another recital as meaning the wakeel's treasury pool of funds, which is somewhat circular as a definition goes.

7. Expert evidence before the court demonstrates that this is a common transaction in the Islamic world. There is indeed HMRC guidance which refers expressly in the context of Value Added Tax to wakala transactions. The guidance is contained in VAT FIN 8500, where the following example is given:

   "An investor agrees to invest a sum with the bank [and I interpose to say that in this case TID is not ostensibly at any rate a bank because its objects clause precludes it from so acting and the activities in its financial statements are otherwise described] for an agreed return (e. g. 5%). The bank pools the investor's funds with the funds of other investors and its own capital and invests in Sharia compliant assets. At the end of a given period (e. g. a month) the bank returns the invested sum to the investor along with the agreed 5%. Any additional revenue that the bank makes on the customer's money is kept by the bank (e. g. if the bank makes 6% then 5% is given to the customer and the additional 1% is kept by the bank). If the bank does not make the agreed percentage return then the investor gets what has been made whilst the bank gets nothing (e. g. if only 4% is achieved then the investor gets the full 4%). "

8. That example seems to presuppose that any shortfall is at the risk of the depositor or investor so that it can fairly be seen as a true investment agency, the bank in that example keeping any surplus over the agreed return, whilst the shortfall is borne by the depositor/investor. The particular master wakala contract with which

I am concerned had (as will appear) a different effect, though it does appear that the reference to the wakeel's treasury pool of funds had the potential (as in the HMRC example) of extending both to other depositors' assets and to TID's own assets, though there is no evidence directly bearing upon the latter aspect.

9. Clause 3. 2 of the master wakala contract set out the mechanisms for making a deposit. The wakeel was to make investment offers from time to time. I have seen a number of such offers in this case which complied with the following requirements. Each offer was to contain the following information: (i) the proposed amount of the funds to be invested in relation to that wakala transaction, "the investment amount"; (ii) the proposed date on which funds were to be received by the wakeel (TID) from the muwakkil/depositor (Blom), "the value date"; (iii) the proposed date on which the wakala transaction would mature, "the settlement date"; (iv) the profit rate anticipated ("the anticipated profit rate") and the profit anticipated to be earned by the muwakkil/depositor in relation to such wakala transaction ("the anticipated profit" for that wakala transaction); and (v) the proposed amount of the agency fee for that wakala transaction. Had the matter stood there the consequence of appointing the wakeel, or TID, as agent in respect of an anticipated profit rate would have been that any monies earned, subject only to the agency fee from the investment, would be for Blom and any losses would be for Blom. However, the matter did not stop there.

10. Clause 3. 7 provided that the investment amount should be invested by the wakeel in its treasury pool and the responsibilities of the wakeel were set out in clause 5. It was provided in 5. 1 that the wakeel was a trustee to the investment/assets of each wakala and should safeguard and protect the wakala investment/assets in a judicious manner as it would safeguard and protect its own investment/assets. Clause 5.2 provided that the wakeel should invest the wakala capital with complete professionalism and expertise and with utmost care, as is expected from a professional Islamic financial institution of the likes of the wakeel. Clause 5. 4 provided as follows:

    "The wakeel shall not utilise the wakala assets for any other purpose except what is permitted by muwakkil/depositor and within the Sharia parameters. The wakeel confirms that the terms of the master wakala contract and the transactions contemplated hereby are in accordance with the Sharia as interpreted by the Sharia committee and it undertakes that it will not at any time assert that any provision thereof or any transaction effected pursuant hereto contravenes the Sharia. "

11. There are two points there. The first is that clause 5. 4 recognised the existence of a Sharia committee. There was indeed a committee within TID of distinguished Sharia scholars, so I am told, who satisfied themselves that the range of transactions undertaken by TID were Sharia compliant. The second point is that this contract, governed, as I say, by English law, precluded purportedly the wakeel, TID, from taking any point on non-compliance with the Sharia.

12. Clause 5. 5 gave the wakeel power to adjust the anticipated profit originally specified in the light of a change of circumstances. In that event under clause 5. 6 the wakeel could be required to terminate the wakala transaction in which case it then became under an obligation to pay to the muwakkil/depositor the investment amount, i. e., the amount originally invested, together with the original anticipated profit calculated for the investment period that had elapsed. That is an important provision because that was an unconditional obligation to pay in the event of termination the original anticipated profit whether or not it had in fact been earned on the investment in TID's treasury pool of funds. We appear in those circumstances to be moving away from the concept of pure agency or trust.

13. Clause 7 dealt with the payment of the wakala profit, as it was described. Clause 7. 1 provided that the funds provided by the muwakkil/depositor would be invested in the treasury pool of the wakeel with effect from the value date. It was also provided that the funds would be treated at par with the funds of the other depositors in the treasury pool, which I understood to mean *pari passu.* Clause 7.2 provided that on the settlement date the wakeel would pay to the muwakkil/depositor an amount equivalent to the profit stated in the respective offer. That amount was to be paid "on account of the profit" in accordance with the offer for such wakala transaction. That on account payment was to equate to the anticipated profit. Thus there was an unconditional obligation to pay the on account profit in the amount of the anticipated profit whether or not it had in fact been earned by the investment (so called) in the treasury pool. There was then to be an adjustment at the end of each calendar quarter, working out the actual profit for the wakala transaction, and clause 7. 4 provided that upon the ascertainment of the actual profit for a wakala transaction, if the actual profit exceeded the anticipated profit for that transaction the muwakkil/depositor agreed to grant such excess amount to the wakeel. That is to say, although the on account payment of the anticipated profit was expressed as an on account payment, any surplus in fact went to the wakeel, TID, as an incentive so that the anticipated profit was in fact the only profit that could be made by Blom.

14. Clause 8 provided for the return of capital on the settlement date along with the so called on account profit. It expressly provided that the wakeel's, TID's, obligations under that clause were unconditional save as provided in the master wakala contract. There was no provision anywhere down to that point (or later) for the muwakkil/depositor, Blom, to bear any losses should losses be made or to receive less than the anticipated profit should the actual profit be less than that. On the contrary, the unconditional obligation to make an on account payment of profit in the amount of the anticipated profit was in the other direction. Furthermore, under clause 9.11 the wakeel, TID, undertook to indemnify the muwakkil/depositor, Blom, against, amongst other things, any loss it might suffer or incur as a result of any wakala transaction or the wakeel acting as its agent. Thus Blom was in a position where the only risk it took was of the insolvency of TID.

15. The results of those rather complicated and sophisticated provisions was that any deposit would be at the specified rate of return, let us say for argument's sake 5 per cent. It could not be less than 5 per cent. It could not be more than 5 per cent. The wakeel, TID, was bound to pay that sum unconditionally and the depositor, Blom, under no circumstances had the right to any more than that sum. It does not appear likely that there would be any other source of repayment than the wakeel's treasury pool of funds and, as that could include payments made in respect of profit which had not in fact been earned, that suggested that the wakeel's treasury pool of funds was freely available to it to satisfy its own contractual obligations and to treat the treasury pool (as the terminology itself suggested) as its own money to that extent. As I have said, there was then a choice of law and jurisdiction clause in favour of England. There was also a severance provision in clause 9. 5.

16. It is said on behalf of TID that that contract amounted to a non-compliant Sharia transaction because, in reality and substance, what TID was doing was taking deposits at interest. Blom says that claim is a nonsense. It points to the undoubted fact that the Sharia committee of (I shall assume) respected scholars had authorised and approved of this form of contract which is a strong indication that the contract was indeed Sharia compliant. There was put in before the master for TID at the very last moment some rather exiguous evidence of Sharia law, which was answered overnight and then supplemented by further evidence on the part of TID. Master Bragge was not especially impressed by TID's evidence but nonetheless considered that there was an arguable case that the transactions entered into pursuant to the master wakala contract were *ultra vires* TID. As moreover questions of capacity of a corporate entity are governed by the law of the place of incorporation, the fact that the master wakala contract was governed by English law was neither here nor there. I agree with Master Bragge that a triable issue has been shown on that score. Blom answered the evidence with the expert opinion of a Dr Hoyle, which the master thought was much more impressive than that of TID. I do not wish to say anything at this stage as to whose expert evidence appears to me to be the better. It seems to me that that is a trial point.

17. Mr Reed for Blom pointed out, as was not disputed, that this defence is a lawyer's construct and the court should approach it with appropriate scepticism for that reason, especially as the Sharia committee apparently approved of this transaction. I agree that the court should approach the matter with some circumspection, but that does not take anything away from what is essentially a simple point, albeit difficult to apply, namely, that where one finds, as one does in this master wakala contract, a device to enable what would at least to some eyes appear to be the payment of interest under another guise, that is at least an indirect practice of a non-Sharia compliant activity. I do not think it appropriate for me to go through the expert evidence in detail because I am satisfied that I cannot resolve which expert is correct on this application.

18. That brings me to the trust claim upon which Blom succeeded before the master. That was objected to before me by TID on the basis that, if one looks at the contract as a whole, and in particular the provision for pooling of funds and the actual obligations of TID, which were essentially obligations to pay sums irrespective of whether they had been earned, the label of trust used in the contract is something which I should ignore. Moreover, it was said that even if there were a trust it is a non sequitur to order TID to pay the whole of the deposited sums. It is not said that the investment of the sums in whatever way they were invested via the wakeel's treasury pool was a breach of trust. The breach of trust is said to consist of the failure to repay. There was evidence in the form of a letter before the master demonstrating, as is in fact blindingly obvious, that the reason for TID's non-payment is that its investment activities have not been as successful as hoped and anticipated and that it has encountered serious cash flow problems. It seems to follow from this that, whatever else might be trust monies or might at one stage have been trust monies, TID is not holding sums now on trust which equate to the amount originally deposited. At most it might hold sums along with other depositors' funds in which there might be some form of shared proprietary interest by way of tracing. I agree with the submissions of TID on both those points. I do not think it is established that the contract gives rise to a trust. Moreover, if the contract is void, it is a nullity and therefore void in all its aspects. Moroever, it is at least arguable that the contract cannot be saved by severance.

19. One is left therefore with asking what the intention of the parties was. Was the intention of the parties to create a trust? The payment to TID was in fact made to enable TID to invest the monies in its treasury pool and to make payments thereout to satisfy its own contractual obligations in circumstances where the parties believed (as both parties clearly did) that the wakala transactions were valid. On the footing that the transactons were ultra vires and void, that would give rise to a restitutionary claim in principle, either based upon a failure of consideration or payment under a mistake, but it would not in the absence of knowledge of the invalidity or mistake on the part of TID necessarily give rise to a trust claim. Moreover, if there were a trust claim the appropriate remedy would be for an account and possibly an interim payment, not for the whole judgment sum. It seems to me therefore that it is sufficiently arguable, and that is all I am concerned with at the moment, that there is no trust claim, at least in the amount claimed by Blom.

20. In those circumstances it seems to me that the appeal should be allowed, though I am asked also to consider the imposition of conditions, which I now do. I do so against the background also of the claim for an interim payment. I am entitled to order an interim payment if I think that the claim would succeed at trial and judgment would be obtained for a substantial amount: CPR 25. 7(1)(c). Having decided that there are triable issues on both the claims presently advanced, it seems initially inconsistent with that proposition that I should also conclude that any of the claims would succeed at trial. However, Mr Reed for Blom made it

plain that if the defences, which were effectively dredged up by lawyers (of whom no criticism is intended) at the last minute before the master, succeed, then he would have, though he does not presently assert, a restitutionary claim to which there is no obvious answer. Ordinarily one would ignore a claim that no one had bothered to plead or advance. Given, however, the ambush which befell Mr Reed's clients at the hearing before the master, it is not surprising that they regarded with great scepticism and scorn the defences that were put forward and stuck to their guns. They barely had opportunity to adjust their sights.

21. I am, however, now looking to the future and, as Mr Reed has made it plain that, if I grant permission to defend, the restitutionary claim will be advanced as an alternative, I do not think it is right to ignore it. It would enable TID to advantage disproportionately from its tactics of ambush. Mr Dougherty for TID appeared to accept that there was at least in principle a restitutionary claim, but understandably relied strongly upon the express disclaimer of such a cause of action before the master. Given that express disclaimer and the absence of pleading, I agree that it would not be right to enter judgment on that claim, but, given also the intention to add such a claim by way of amendment (which I am prepared to allow) I am entitled to look at that in the context of an interim payment to consider what defence there might possibly be. The only defence that has been put forward by Mr Dougherty is a defence of change of position. It is said that TID has changed its position by investing the funds in good faith in its treasury pool upon the assumption it was free to do so. So it has, but it did so also upon the assumption that it would have to pay the funds back. It does not seem to me in those circumstances that the anticipated defence of change of position has any likelihood of success. Ultimately, if the master wakala contract is *intra vires*, the contract claim will succeed. If not, the restitutionary claim will succeed. Either way, TID is liable for at least the whole of the amounts deposited.

22. In those circumstances it seems to me that it is appropriate to order an interim payment of the whole of the principal amount claimed, that is to say, in the judgment sum granted by the master, and I will therefore allow the appeal but do so conditional upon that interim payment being made. The question then is: to whom should the interim payment be made? On the face of it, it should be made to Blom, but Blom, though a highly respected Lebanese company, owes no allegiance to the English court and TID is concerned that it may in the event, if all its defences ultimately succeed, have no means of recovery from a Lebanese company. Had I thought that there was at the end of the day any significant chance of that result being achieved, I would have required either a payment into court or the retention of the sums within the jurisdiction. However, as far as I can see, one way or another Blom is bound to succeed and I shall therefore order the interim payment to be paid to Blom unconditionally in the amount of the judgment sum.

23. Formally, therefore, the appeal is allowed but conditional upon the interim payment in the amount of the present judgment being made to Blom within a

period upon which I will now hear argument. I should add that my jurisdiction to attach a condition has not been challenged, and is confirmed by CPR 3.1(3).