**TAN SRI ABDUL KHALID IBRAHIM** A

**v.**

**BANK ISLAM MALAYSIA BHD & ANOTHER CASE**

HIGH COURT MALAYA, KUALA LUMPUR B
ROHANA YUSUF J
[SUIT NOS: D4-22A-216-2007 & D4-22A-227-2007]
21 AUGUST 2009

***CIVIL PROCEDURE:*** *Summary judgment - Application for - Triable issues - Whether raised* C

***BANKING:*** *Banks and banking business - Islamic banking - Facilities - Murabaha Facilities restructured into Revolving Al-Bai Bithan Ajil Facility (BBA Facility Agreement) - Default of payment - Claim for sum of USD18,521,806.13 - Allegation of the existence of a collateral agreement - Whether highly improbable - Whether oral evidence could be used to contradict written obligations - Validity of BBA Facility Agreement - Whether challenged for want of compliance with principles of Syariah - Evidence of admission of liability - Whether application for summary judgment allowed* D E

***BANKING:*** *Banks and banking business - Securities - Pledged shares - Bank has absolute discretion to sell shares as security in satisfaction of sums due - Whether bank wrongfully sold pledged shares - Whether there was requirement to seek consent of defendant to sell pledged shares - Whether there was impropriety in sale of shares* F

There were two legal suits involving the parties. One was a claim by Bank Islam Malaysia Berhad against Tan Sri Abdul Khalid Ibrahim (Tan Sri Khalid) in suit no. D4-22A-227-2007 and the other was a claim by Tan Sri Khalid against the bank in suit D4-22A-216-2007. Both suits were consolidated. Pursuant to suit no. 22A-227-2007, this application in encl. 5, by Bank Islam Malaysia Berhad, was made under O. 14 of the Rules of the High Court 1980. *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 Berhad. Both Bank Islam (L) Ltd and Bank Islam Malaysia Berhad would hereafter be referred to interchangeably as 'the Bank'. The background facts were that the Bank had provided two Murabaha Facilities to Tan Sri Khalid, to redeem and G H I

acquire more shares in a company called 'Kumpulan Guthrie Berhad'. However, 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 and by that acceptance, the two Murabaha Facilities were restructured into a Revolving Al-Bai Bithaman Ajil Facility (BBA Facility Agreement). The salient terms of the BBA Facility Agreement were, *inter alia*, (a) the bank to purchase from Tan Sri Khalid 39,681.562 shares of Kumpulan Guthrie (Guthrie Shares) for USD56,500,000; (b) the bank to resell the shares to Tan Sri Khalid at a sale price; (c) at every six monthly intervals, the parties would 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 to be paid in instalments by Tan Sri Khalid; (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) default of payment gave the bank the right to declare that the indebtedness was due and payable by Tan Sri Khalid and to enforce the BBA Facility Agreement. Tan Sri Khalid defaulted the first instalment under the restructured BBA Facility Agreement and hence, this suit. In encl. 5, the bank was applying to enter summary judgment for a sum of USD18,521,806.13 or its equivalent in Ringgit Malaysia. Tan Sri Khalid, however, alleged an existence of a collateral agreement and attempted to challenge the validity of the BBA Facility Agreement on various grounds. The issues that arose were: whether there existed a collateral agreement between the parties orally and by conduct; whether the validity of the BBA Facility Agreement was challenged for want of compliance with the principles of Syariah; whether the mode of execution of Asset Purchase Agreement (APA) and Asset Sale Agreement (ASA) was improper because Tan Sri Khalid was made to sign the agreements first before they were passed back to be completed by the Bank; whether there was wrongful sale of pledged shares because of (1) the Bank's failure to obtain the consent from Tan Sri Khalid and (2) that there may have been impropriety on the part of CIMB Investment Bank Berhad who handled the sale of the pledged Guthrie Shares.

**Held (allowing the application in encl. 5):**

**(1)** The terms of the alleged collateral agreement were 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 seemed implausible in view of the two letters by Tan Sri Khalid seeking indulgence from the bank for deferment of payment. These two letters could not be anything less than admission by Tan Sri Khalid of his liabilities under the Murabaha Agreements, which was now restructured. The evidence of negotiations, if any, prior to restructuring of the BBA Facility Agreement was not evidence that could be admitted in view of ss. 91 and 92 of the Evidence Act 1950, as they directly contradicted the expressed written provisions of the BBA Facility Agreement. (para 9)

**(2)** Tan Sri Khalid was an experienced and astute businessman. He was then Chief Executive Officer of Guthrie Berhad and now the Menteri Besar of Selangor. It was too preposterous to expect a person of such standing to rely on oral promises which contradicted the agreements he signed freely and voluntarily. He surely must have understood and was fully aware of the implications of what he had signed. This was not an appropriate case where a party to a contract could be said to have relied on oral promises that ran contradictory to what he had 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 agreement would run foul of s. 91 of the Evidence Act 1950. Even if there was any indulgence granted by the Bank, it could not be interpreted to create a partnership between them. The allegation of an existence of a collateral agreement, and that he relied upon them, was highly improbable, given the circumstances. (para 10)

**(3)** Questioning the validity of an agreement after benefitting from it and upon default, in itself lacked *bona fide*. Tan Sri Khalid was in the position to obtain any Syariah 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 appeared to be a mere afterthought. (para 13)

**(4)** Section 16B of the Central Bank of Malaysia Act 1958 creates the Syariah Advisory Council (SAC) under the aegis of the Bank Negara Malaysia (Bank Negara). Section 16B designates

A 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. In view of Section 16B(7) of the Central Bank Act 1956, it would not be wrong to assume that when Bank Negara issued directives involving
B Syariah 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. An enquiry was made to the SAC as to whether a ruling had been made on the
C status of the BBA Agreement. The secretariat to SAC had responded with a written ruling from the SAC which stated essentially, that the BBA Agreement was acceptable and a recognised transaction in Islam. While counsel for Tan Sri Khalid argued that there was a whole host of Syariah rules that
D must be complied with in this transaction, it must be pointed out that there was another side to fulfilling contractual obligations in the eyes of the Syariah. The demand on a person to fulfil contractual obligations in Syariah was an onerous one. (paras 15, 16 & 22)

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**(5)** The consensus between parties had been arrived at the point the letter of offer was accepted by Tan Sri Khalid. The agreement to be bound was subject to formalities of the execution of various documents. Signing of the written
F agreements was to formalise and to translate the consensus of parties in the terms clearly agreed upon. It was always the practice, for the borrower to affix signatures on all banking documents before the bank executed the same, and it was rather inconceivable to suggest that it could affect the validity
G of the contract. Furthermore, a written confirmation from the Bank's own Syariah council confirmed that the mode employed for the execution of the documents in the present case was in order and had no bearing from Syariah perspective. (para 16)

H **(6)** There was no clause in the agreement that required the bank to seek Tan Sri Khalid's consent to sell the pledged shares. 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
I Tan Sri Khalid. The pledged shares were sold by the bank, when Tan Sri Khalid failed 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 was taken against Tan Sri Khalid. As such, this court failed 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 shares to remedy his outstanding. Further, 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 was no evidence of such impropriety shown to this court. (paras 23 & 24)

**(7)** 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. His letters in exh. MR3 and MR5 sought to defer payment under the 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 provided so plainly and clearly that the purpose of the restructuring agreement was to finance the existing Murabaha Facilities. Finally, his letter in exh. MR31 showed his admission on his liability. On this ground alone, the application in encl. 5 should be granted. (paras 24 & 25)

**(8)** There were no *bona fide* triable issues raised in this application.

**Case(s) referred to:**

*Arab-Malaysian Finance Bhd v. Taman Ihsan Jaya Sdn Bhd & Ors; Koperasi Seri Kota Bukit Cheraka Bhd (Third Party) And Other Cases [2009] 1 CLJ 419* ***(refd)***

*Bank Islam Malaysia Bhd v. Adnan Omar [1994] 3 CLJ 735 HC* ***(refd)***

*Bank Kerjasama Rakyat Malaysia Bhd v. PSC Naval Dockyard Sdn Bhd [2008] 1 CLJ 784 HC* ***(refd)***

*Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd [2003] 1 CLJ 625 CA* ***(refd)***

*Ng Hee Thong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA* ***(refd)***

*Noh Hyoung Seok v. Perwira Affin Bhd [2004] 2 CLJ 64 CA* ***(refd)***

*Simon Mahanraj Appaduray & Anor v. Reginald Ananda & Anor [1981] CLJ 136; [1981] CLJ (Rep) 271 HC* ***(refd)***

*Tan Swee Hoe Co Ltd v. Ali Hussain Bros [1979] 1 LNS 113 FC* ***(refd)***

**Legislation referred to:**

Central Bank of Malaysia Act 1958, s. 16B(2), (7), (8)
Contracts Act 1950, 24
Evidence Act 1950, ss. 91, 92

A Islamic Banking Act 1983, s. 2
Rules of the High Court 1980, O. 14

*For the plaintiff - Tommy Thomas (Ganesan Nethi with him); M/s Tommy Thomas*
*For the defendant - Malik Imtiaz Sarwar (Mathew Thomas Philip with him);* B *M/s Thomas Philips*

*Reported by Suhainah Wahiduddin*

C

## JUDGMENT

**Rohana Yusuf J:**

**[1]** There are two legal suits involving the parties. One is a claim by Bank Islam Malaysia Berhad against Tan Sri Abdul Khalid bin D Ibrahim (Tan Sri Khalid) in Suit No D4-22A-227-2007 and the other is a claim by Tan Sri Khalid against the bank in Suit D4-22A-216-2007. Both suits are now consolidated. Pursuant to Suit No. 22A-227-2007 this application in encl. 5, by Bank Islam Malaysia Berhad is made under O. 14 of the Rules of the High E 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 F were transferred to and vested in Bank Islam Malaysia Berhad. Both Bank Islam (L) Ltd and Bank Islam Malaysia Berhad will hereafter be referred to interchangeably, as "the bank".

**Background Facts**

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**[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 Berhad". Tan Sri Khalid failed to pay the first instalment under the H 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 I 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;

(i) Letter of offer to restructure Murabaha Facilities dated 17 April 2001 (in exh. MR6.)

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

(iii) Master Revolving BBA Facility (BBA Agreement) in exh. MR7.

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

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

The salient terms of the BBA Facility Agreement are as follows.

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

(ii) 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%.

(iii) 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.

(iv) 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.

(v) 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.

(vi) 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.

A (vii) 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.

B **[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.

C **[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.

D **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 E 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 Berhad; that the tenure of BBA Facility Agreement would be for a period of ten years and the principal amount would only be due for F 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 G 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 H 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.

I **[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 s. 91 and 92 of 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 be 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* [1979] 1 LNS 113, 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 Berhad 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 Syariah. 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 Syariah compliant, the bank did not produce opinion to the contrary nor any approval from the Bank's Syariah Supervisory Council. He submits that expert opinion is required to determine the issue at hand. He cites the case of *Simon Mahanraj Appaduray & Anor v. Reginald Ananda & Anor* [1981] CLJ 136; [1981] CLJ (Rep) 271. 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 Syariah opinions which essentially raise issues with BBA Agreement in the eyes of Syariah. 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 CLJ 64. In *Ng Hee Thong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 CA 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 Syariah 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 Syariah 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 Syariah 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 BBA Agreement under the Syariah. Encik Malik Imtiaz contends that since 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 1958. Section 16B creates the Syariah 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 Syariah matters relating to Islamic Banking Business, Takaful Business, Islamic Financial Business, Islamic Development Financial Business, or any other business which is based on Syariah 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 Syariah scholars. Looking at s. 16B(7), I would not be wrong to assume that when Bank Negara issues directives involving Syariah 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 Syariah 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 counsels on the Syariah 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 recognized transaction in Islam. I have furnished the said written ruling from the SAC to both counsels. Thereafter, counsel for Tan Sri Khalid in a letter dated 5 May 2009 seeks leave for a further submission on the Syariah 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 Syariah 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 Syariah 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 recognized 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 recognized under the legislation to issue ruling and direction on the applicable Syariah 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 Syariah, 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 Syariah position. In fact, it is well accepted that a legitimate and responsible Government under the doctrine of siasah-as-Syariah is allowed to choose, which amongst the conflicting views is to be adopted as a policy, so long as they do not depart from 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 Syariah scholars. This, I believe will enable the body to arrive at a well informed decision instead of deciding the Syariah issue in isolation. Bearing in mind the response from the SAC to this case, namely, that BBA is a recognized form of transaction and is within Syariah, 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 Syariah views, parties may generally enter into an agreement basing on any particular view or opinion and they are bound by the contracting terms based on that particular Syariah 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 open to him to now says that the BBA terms should have been interpreted and implemented differently.

**[20]** The issue of validity of 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) And Other Cases* [2009] 1 CLJ 419. Among the issues 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 Bhd v. Adnan Omar* [1994] 3 CLJ 735 and *Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd* [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 Syariah 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 Syariah. The demand on a person to fulfil contractual obligations in Syariah is an onerous one. I have in an earlier decision in *Bank Kerjasama Rakyat Malaysia Berhad v. PSC Naval Dockyard Sdn Bhd* [2008] 1 CLJ 784 HC made my observation on sanctity of contract and the demand on performance of a contractual obligations in the eyes of Syariah. 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 Berhad 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 seek to defer payment under the 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 USD50,000,000 million 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.