DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN DAGANG)

GUAMAN NO. 22A-119-02/2013

ANTARA

BANK MUAMALAT MALAYSIA BERHAD - PLAINTIF

DAN

1. SUHAILI BIN ABDUL RAHMAN

2. MOHD ZAINI BIN MOHD ARIFF - DEFENDAN-DEFENDAN

GROUNDS OF JUDGMENT

Enclosure 47 is the 1st defendant's appeal against the decision of the Senior Assistant Registrar dated 24th February 2014.

[2] By an agreement dated 20th May 1998, Moccis Trading Sdn Bhd ("Moccis") took an Al-Bai Bithaman Ajil ("BBA") Islamic banking facilities in the sum of RM30 million from 2 banks, BSN Commercial Bank (Malaysia) Berhad and MNI Takaful Sdn Bhd (the "Financing Banks") (the agreement is known as the "Guarantee (Al-Kafalah) Facility Agreement"). Perwira Affin

Merchant Bank Berhad was the facility agent and arranger for the Financing Banks.

[3] Bank of Commerce (M) Berhad and two other (the "Al-Kafalah Guarantor Banks") provided the Financing Banks an Al-Kafalah Islamic –banking bank guarantee dated 20th May 1998 as security (Al-Kafalah Guarantee"). By a Vesting Order dated 03rd September 1999, the plaintiff was vested with the Islamic banking services and products of Bank of Commerce (M) Berhad. Subsequently, as consideration to the Al-Kafalah Guarantor Banks' consent to a change of the shareholders in Moccis, the defendants including the 1st defendant executed a Guarantee dated 20th November 2000 ("Guarantee") in favour of the Al-Kafalah Guarantor Banks (inclusive of the plaintiff) and to secure Moccis' obligations in respect of the facilities granted. Moccis defaulted and the plaintiff made payment of RM10 million to the Financing Banks. Moccis did not pay the sums owed to the plaintiff, and was wound up on 04th July 2011. The plaintiff enforced the Guarantee and demanded payment from the defendants. Both the 1st and 2nd defendants did not make payment on the demand made.

[4] Hence the plaintiff commenced this action against the defendants. On 29th October 2013, summary judgment was entered against the 2nd defendant who had appealed against the decision. However, the 2nd defendant's appeal was dismissed by the Court of Appeal.

[5] As against the 1st defendant, the Writ and Statement of Claim were served on him by way of substituted service pursuant to the court order dated 02nd May 2013. The 1st defendant failed to enter appearance, hence judgment in default of appearance was entered against him on 26th June 2013.

The Application

[6] The 1st defendant had filed a Notice of Application dated 08th October 2014 to set aside the judgment in default. However on the 24th December 2014, the learned Senior Assistant Registrar had dismissed the application. Hence, enclosure 47 was filed by the 1st defendant i.e his appeal to the Judge in Chambers against the Senior Assistant Registrar's decision; which is now before me.

The 1st Defendant's Ground to Set Aside

[7] - That the judgment in default is irregular as the Plaintiff knew of 1st Defendant's latest address but still relied upon the address in the Guarantee which was 14 years ago.

- The BBA Facility Agreement has been compromised as the 1st Defendant is not a party and/or privy to the Bai Inah Agreement and the Restructuring Agreement.

- The 1st Defendant had never entered into a new *aqad* in respect of the Bai Inah Facility or the Restructuring Agreement. The only agreement executed by the 1st Defendants was the Guarantee Agreement which was entered pursuant to the BBA Facility. Bai Inah Agreement and Restructuring Agreement is not enforceable against the 1st Defendant as both are not in compliance with the principles of Shariah and is also against the ruling by the Shariah Advisory Council

Decision

[8] I have perused the cause papers and considered submissions made by the parties. It is my view that there is nothing wrong with the decision of the learned Senior Assistant Registrar and this appeal must be dismissed on the following reasons:

First Issue - Whether the judgment obtained is irregular and must be set aside *ex debitio justitae*

i. A regular judgment is obtained when service is regular. In addressing the first issue, it is pertinent to note that the service on 1st Defendant was made pursuant to an order for substituted service dated 02nd May 2013. The Court of Appeal in the case of **Ng Han Seng & Ors v Scotch Leasing Sdn Bhd [2003] 4 CLJ 533** held that an application to set aside a judgment in default obtained from non-appearance pursuant to the Substituted Service Order ("SS Order") being perfected must be made separately.

ii. Based on that case, an application must be made separately, and not collaterally with an application to

set aside Judgment in Default, to the Courts for the SS Order to be set aside. The 1st Defendant did not raise or include in its prayers for Encl 40 that the SS Order be set aside. With this authority, I find that the SS Order was not challenged resulting that the service is valid and effective and the Judgment in Default is regular.

iii. In any event, there is no evidence and no contentions of any charge in the address of the 1st defendant. The plaintiff is entitled to rely on the address given as provided by clause 27 of the Guarantee.

Second Issue - If the judgment is regular, whether the Defendant could show that he has a defence on merits

i. The 1st Defendant did not file any draft defence in its affidavits. In **Lembaga Kumpulan Wang Simpanan Pekerja v Agni Energie Sdn Bhd & Ors [2014] 8 MLJ 565** , it was held that :

"*To show a defence with merits, a draft defence must also be filed".*

ii. On whether the Plaintiff is entitled to rely on the Al Kafalah Guarantee to pursue this claim, I believe that this issue has been settled in the case against the 2nd Defendant when a Summary Judgment was entered against him and this decision was affirmed by the Court of Appeal on 15th January 2014. The Court of Appeal had recognised the Al- Kafalah Guarantee and the liability of 2nd Defendant under the Guarantee. Hence I am of the view that the same applies as against the first defendant.

iii. Further the 1st defendant The 1st Defendant agreed to his liability under the Guarantee is a continuing guarantee as stated in Clauses 2,3,4, 5 and 14 of the Guarantee. Despite variation in the scheme for repayment based on the type of the facility granted by the Plaintiff to Moccis under the Al-Kafalah Guarantee,

the purpose of the guarantee remains the same and 1st Defendant's liability is independent of such variation. Refer to the Court of Appeal in **Mulpha Pacific Sdn Bhd v Paramount Corp Bhd [2013] 4 MLJ 357**.

Third Issue – The Non-Shariah Compliance of the Agreement

i. It is my view that the Shariah Advisory Council Resolution for restructuring of Islamic Financing Facilities is applicable to the Main Facility Agreement. The 1st Defendant was well aware of his liabilities when he executed the Guarantee to secure the repayment of the Al-Kafalah Guarantor Bank. The attempt at restructuring of the MOCCIS debt was not a new facility and never conflicted with the Defendant's original liabilities under the Guarantee. Under the Guarantee, the 1st defendant's liability is several and continuing and not dependant on Moccis'. Even the Court of Appeal had affirmed the High Court's decision in the case against the 2nd

defendant, that this Guarantee is valid and enforceable.

Conclusion

[9] Based on the above, enclosure 47 is dismissed with costs.

DATO' ZALEHA BINTI YUSOF
JUDGE
HIGH COURT OF MALAYA
KUALA LUMPUR

Dated : 09th March 2015

For the 1st Defendant: Abdullah Khubayb bin Awaluddin with Shahrir bin Ab Razak ; Messrs Shahrir Razak & Associates

For the Plaintiff: Ng Sai Yeang withTai Wei Jeat : Messrs Raja Darryl & Loh