



**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
IN THE WILAYAH PERSEKUTUAN, MALAYSIA
(MUAMALAT DIVISION)
[ORIGINATING SUMMONS NO: WA-24M-1-01/2016]**

Dalam Perkara mengenai Perjanjian Fasiliti bertarikh 31.7.2012 dan Surat Tawaran bertarikh 31.5.2012 di antara Kuwait Finance House (Malaysia) Berhad dan Citranet Sdn Bhd bagi kemudahan pembiayaan Ijariah Muntahiah Bitamlik di bawah nombor akaun A00900000090159

Dan

Dalam Perkara mengenai Penyata Penebusan dan Surat Akujanji (Redemption Statement cum Letter of Undertaking) bertarikh 7.1.2014

Dan

Dalam Perkara mengenai Pendebitan wang berjumlah RM623,328.93 dari akaun 'escrow' di bawah nombor akaun 007105001136

Dan

Dalam Perkara Seksyen-Seksyen 28, 135, 136 dan Jadual 7 Akta Perkhidmatan Kewangan Islam 2013

Dan

Dalam Perkara mengenai seksyen 41 Akta Relif Spesifik 1950

Dan



Dalam Perkara mengenai Aturan 7 Kaedah 3, Aturan 15 Kaedah 16, Aturan 28, Aturan 42 Kaedah 12A dan Aturan 92 Kaedah 4 Kaedah-Kaedah Mahkamah 2012.

ANTARA

CITRANET SDN BHD

(No. Syarikat: 459523 - U)

... PLAINTIF

DAN

KUWAIT FINANCE HOUSE (MALAYSIA) BERHAD

(No. Syarikat: 672174 - T)

... DEFENDAN

CIVIL PROCEDURE: Declaration - Application for - Declaration that sum stated in letter of redemption was full and final settlement - Declaration to set off - Whether conditions under s. 41 of Specific Relief Act 1950 had been complied with for declaratory relief - Whether declaration sought was legal - Whether plaintiff established they had a legal right to declaration sought

[Plaintiff's application dismissed with costs.]

Case(s) referred to:

Jafri Amin & Ors v. Persatuan Automobil Malaysia [1987] 1 LNS 108 HC (refd)

Ladang Tai Tak (KT) Sdn Bhd v. Suppiah Andy Thavar & Ors [1999] 6 CLJ 257 HC (refd)

Legislation referred to:

Specific Relief Act 1950, s. 41

Islamic Financial Services Act 2013, ss. 135, 281



Grounds of Decision

Azizah Nawawi, J:

Application

- [1] The Plaintiff's Originating Summons dated 4.1.2016 seeks the following orders:
- (i) a declaration that the sum of RM27,939,421.17 (as at 31.3.2014) in the Defendant's Letter of Redemption and Undertaking (dated 7.1.2014) is the full and final settlement of the financing facility *Ijarah Muntahiah Bitamlik* under account number A00900000090159;

- (ii) a declaration that the debiting and/or set off of monies in the sum of RM623,328.97 on 7.3.2014 by the Defendant in relation to the Plaintiff's Escrow Account under account number 007105001136 is not legal and void; and
- (iii) an order that the Defendant return the sum of RM623,328.97 to the Plaintiff within 14 days from this Order, failing which the Defendant is to return the said sum of RM623,328.97 together with interests.

The Salient Facts

- [2] The Defendant is a financial institution whilst the Plaintiff is a customer of the Defendant.
- [3] *Vide* a letter dated 31.5.2012, the Defendant provided the Plaintiff with a number of Islamic banking facilities, including a *Ijarah Muntahiah Bitamlik Asset Acquisition Financing - i* for RM40,000,000.00.
- [4] The Defendant and the Plaintiff then entered into a Facility Agreement on 31.7.2012.
- [5] As at 16.4.2013, the Defendant has made 5 disbursements totaling RM37,585,231.80 to the Plaintiff under the *Ijarah Muntahiah Bitamlik Asset Acquisition Financing – i* facility.

- [6] At the material time, the Plaintiff also maintain an Escrow Account Number 007105001136 with the Defendant.
- [7] As at **3.10.2013**, there was a sum of **RM34,731,037.76** (principal amount) due and owing under the *Ijarah Muntahiah Bitamlik Asset Acquisition Financing – i* under Account number A00900000090159.
- [8] As at 3.10.2013, there was a sum of RM2,609,271.90 (credit) in the Plaintiff’s Escrow Account and RM6,035,082.07 (credit) in the Plaintiff’s seven (7) GIA Accounts.
- [9] In a letter dated 16.12.2013, the Plaintiff informed the Defendant that the Plaintiff has obtained financing from Malaysian Debt Ventures Berhad (MDV). On 17.12.2013, the Plaintiff has authorized Messrs Jeffrey, Wong, Ho & Lim (‘MDV Lawyers’) to request for a Redemption Statement from the Defendant in order for the Plaintiff to redeem the *Ijarah Muntahiah Bitamlik Asset Acquisition Financing – i* (A00900000090159).
- [10] The Defendant received *verbal* instructions from the MDV Lawyers to issue the Statement of Redemption after taking into account the credits in both the Plaintiff’s Escrow and GIA accounts.
- [11] On 7.1.2014, the Defendant has issued a Redemption Statement (after taking into account the credits in both the Plaintiff’s Escrow and GIA accounts) to the MDV Lawyers, stating the redemption sum for three (3) months to be as follows:



On or before 31.1.2014	On or before 28.2.2014	On or before 31.3.2014
RM27,533,910.85	RM27,738,301.43	RM27,939,421.17

[12] On 26.2.2014, MDV paid the sum of **RM27,738,301.43**, pursuant to the said Redemption Statement, which was the redemption figure payable by **28.2.2014**. Added to that, on 7.3.2014, the Defendant had also set off/deducted the sum of RM4,388,581.08 from the Plaintiff’s Escrow and GIA Accounts with the Defendant.

[13] Therefore the Plaintiff’s *Ijarah Muntahiah Bitamlik Asset Acquisition Financing – i* account was redeemed for the total sum of RM32,126,882.51, consisting of:

- (i) RM27,738,301.43 from MDV; and
- (ii) RM4,388,581.08 from the Plaintiff’s Escrow and GIA Accounts.

[14] In a letter dated 7.3.2014, the Defendant informed the Plaintiff that their *Ijarah Muntahiah Bitamlik Asset Acquisition Financing – i* had been fully redeemed.



- [15] In a letter dated 14.10.2014, and with reference to the Statement of Account for March 2014 (in respect of the RM4,388,581.08 deduction from the Plaintiff's Escrow and GIA Accounts), the Plaintiff seek the clarification on the Exit Fee/("Exercise Fee") of RM623,328.93 charged to the Plaintiff, which was not stated in the Redemption Statement.
- [16] In their letter in reply dated 11.11.2014, the Defendant informed the Plaintiff that since the early settlement of the banking facility was made less than 3 months from the Notice of Redemption for full settlement, then the "Early Termination" of Lease Term by Customer under Clause X (ii) of the Defendant's Letter of Offer" applies.
- [17] In a letter dated 16.6.2015, the Plaintiff's lawyer demanded the return of the sum RM623,328.93.
- [18] When the Defendant refused to return the said sum, the Plaintiff filed this application seeking a return of the same amount.

The Findings of the Court

- [19] This application seeking declaratory is made pursuant to section 41 of the Specific Relief Act 1950 ('SRA 1950'), which reads:

"41. Discretion of court as to declaration of status or right.

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he so entitled, and the plaintiff need not in that suit ask for any further relief:...”

- [20] Therefore, under s. 41, SRA 1950, a declaration can be sought as to the Plaintiff’s entitlement to a legal character, status or right to property. In *Jafri Amin & Ors v. Persatuan Automobil Malaysia* [1988] 1 MLJ 336, the Court held that where an applicant is not entitled to any legal character or to any right as to any property, he cannot invoke s. 41 of the SRA, 1950.
- [21] In *Ladang Tai Tak (KT) Sdn Bhd v. Suppiah a/l Andy Thavar* [1999] 5 MLJ 257, the Court held that a declaratory may be granted by the Court if the following conditions are satisfied:
- (i) there must exist a controversy between the parties
 - (ii) the proceedings must involve a “right”
 - (iii) the proceedings must be brought by a person who has a proper or tangible interest (ie, the *locus standi*)
 - (iv) the controversy must be subject to the court’s jurisdiction
 - (v) the defendant must be a person having an interest to oppose the application
 - (vi) the issue must be ‘ripe’, ie, it must not be of academic interest, hypothetical or one whose resolution would be of no practical utility



- [22] The issue then is whether the Plaintiff has establish all the above conditions before this Court may grant the declaration sought.
- [23] In the first prayer of the Originating Summons, the Plaintiff is seeking a declaration that the sum of **RM27,939,421.17** (as at 31.3.2014) in the Defendant's Letter of Redemption and Undertaking (dated 7.1.2014) is the full and final settlement of the financing facility *Ijarah Muntahiah Bitamlik* under account number A00900000090159.
- [24] However, as can be seen from paragraph 10.2 of the Defendant's affidavit affirmed on 29.1.2016 and paragraph 4.2.2 of the Defendant's second affidavit affirmed on 4.3.2016, MDV had paid RM27,738,301.43 on 26.2.2014. This corresponds with the redemption sum payable by 28.2.2014. These facts have not been disputed by the Plaintiff and are therefore deemed to be admitted.
- [25] As such, I am of the considered opinion that there is no basis for the declaration that the sum of **RM27,939,421.17** in the Defendant's Letter of Redemption and Undertaking as full and final settlement when MDV only paid RM27,738,301.43 on 26.2.2014.
- [26] Added to that, I agree with the Defendant that the sum of RM27,939,421.17 cannot be the full and final settlement sum because the Plaintiff was informed *vide* letter dated 4.10.2013 that as at 3.10.2013, the total amount outstanding under the Plaintiff's facility was **RM34,731,037.76**.



[27] Further, the Plaintiff did not dispute the Defendant's contention that the MDV lawyers had requested that the Defendant is to issue the said Redemption Statement after taking into account or uplifting the funds in the Escrow and GIA accounts. This is supported by the Statement of Account for March 2014 (exhibit KFHH-6) where it is shown that RM4,388,581.08 was debited from the Plaintiff's accounts. Added to that, in paragraph 11.1 of the Plaintiff affidavit in reply affirmed on 18.2.2016 (in response to paragraph 10.2 of the Defendant's affidavit), the Plaintiff has admitted that the Defendant can deduct the monies from the Plaintiff's Escrow and GIA accounts to settle part of the *Ijarah Muntahiah Bitamlik* facility.

[28] Therefore the Plaintiff's *Ijarah Muntahiah Bitamlik Asset Acquisition Financing – i* account was redeemed for the total sum of **RM32,126,882.51**, consisting of the sum of **RM27,738,301.43** from MDV and **RM4,388,581.08**, which was uplifted from the Plaintiff's Escrow and GIA Accounts. As such, there is no legal basis for the first declaratory order.

[29] The second prayer of the Originating Summons is for a declaration that the debiting and/or set off of monies in the sum of RM623,328.97 on 7.3.2014 by the Defendant in relation to the Plaintiff's Escrow Account under account number 007105001136 is not legal and void.

[30] The Plaintiff's contention on this is premised on two (2) grounds:

- (i) that the Plaintiff had made the redemption for a period more than three (3) months from the date of the notice of redemption dated 16.12.2013; and
- (ii) that the said exit fee was never disclosed in the Redemption Letter dated 7.1.2014 and therefore renders the Redemption Letter dated 7.1.2014 as full and final settlement.

[31] In the Letter of Offer dated 31.5.2012, Clause X (ii) provides for "Early Termination of Lease Term by Customer, and under sub clause (e), it provides that:

"In lieu of 3 months in advance written notice by the Customer of KFHMB, a sum equivalent of 1.0% above the BFR p.a. calculated on the amount referred to in (a) above multiplied by three(3)."

[32] Therefore under the above provision, the Plaintiff will have to pay a sum equivalent of 1% above the BFR calculated on the amount referred to as the outstanding fixed portion (RM32,806,785.64) multiplied by three (3) - $(RM32,806,785.64 \times 7.60\%/12) \times 3 = RM623,328.93$.

[33] The Plaintiff did not dispute the above clause but contends that that they had made the redemption for a period more than three (3) months from the date of the notice of redemption dated 16.12.2013. The Plaintiff informed the Defendant of its intention to redeem the facility in its letter dated 16.12.2013 and the MDV has also issued a letter dated 17.12.2013 requesting for the redemption statement. Based on the Redemption Letter dated 7.1.2014, the Plaintiff contends that MDV has redeemed the outstanding balance calculated on/before 31.3.2014 for the sum of RM27,939,421.17. Thus, the Plaintiff submits that since the notice for redemption was given on 16.12.2014 and the Plaintiff redeemed the total sum of RM27,939,421.17 calculated on or before 31.3.2014, then the redemption was made 3 months period after the notice of redemption dated 16.12.2014.

[34] However, the Plaintiff's submission clearly contradicted the admission made by the Plaintiff that the redemption was short by 11 days of three (3) months. In paragraph (32) of the affidavit in support affirmed on 4.1.2016, the Plaintiff, *inter alia*, states as follows:

“32. ... Hanya di sebabkan wang penebusan dibayar pada 7.3.2014, iaitu 11 hari sebelum tempoh 3 bulan luput pada 18.3.2014, Defendan secara unilateral menolak wang tersebut sebanyak RM623,328.93 daripada akaun escrow Plaintiff...”

- [35] Therefore, from the Plaintiff's notice to redeem dated 16.12.2016 and the date of full redemption on 7.3.2014, the notice was not in accordance with Clause X (ii) of the Letter of Offer and the Plaintiff has the legal right to impose the exit fees.
- [36] The next issue raised by the Plaintiff is that the said exit fee was never disclosed in the Redemption Letter dated 7.1.2014, then this is against the guidelines issued by Bank Negara on full and frank disclosure. It is the submission of the Plaintiff that the Defendant has failed to give notice in respect of the exit fees, and is therefore in breach of the Guidelines on Product Transparency and Disclosure issued by Bank Negara pursuant to section 135 of the Islamic Financial Services Act 2013 ('IFSA 2013').
- [37] However, I am of the considered opinion and I agree with the Defendant that this is a non-issue as section 281 of IFSA 2013 clearly provides that any contract entered, which is in breach of IFSA 2013 shall not be void by reason of such breach. Section 281 reads as follows:

“281. Except as otherwise provided in this Act, or in pursuance of any provision of this Act, no contract, agreement or arrangement, entered into in breach or contravention of any provision of this Act shall be void solely by reason of such breach or contravention:

Provided that nothing contained in this section shall affect any liability of any person for any administrative, civil or criminal actions under this Act in respect of such breach or contravention.”



[38] Premised on the reasons enumerated above, I am of the considered opinion that the Plaintiff has failed to establish that they have a legal right to the declaration sought and therefore the application is dismissed with costs.

(AZIZAH HAJI NAWAWI)
JUDGE
HIGH COURT MALAYA
(Commercial Division)
KUALA LUMPUR

Dated: 13 JULY 2016

COUNSEL:

*For the plaintiff - Abd Shukor Tokachil; M/s Akram Hizri & Azad
Kuala Lumpur.*

*For the defendant - Ramesh Gopal; M/s Rajes Hisham Rahim &
Gopal
Kuala Lumpur.*