PARTI KEADILAN RAKYAT

Pejabat Setiausaha Agung

Parti Keadilan Rakyat
A-1-09, Merchant Square
No. 1, Jalan Tropicana Selatan 1
47410 Petaling Jaya
TELEFON: +603 7885 0530
FAKS: +603 7885 0531
E-MAIL: ibupejabat@keadilanrakyat.org
LAMAN WEB: www.keadilanrakyat.org

RUJUKAN KAMI: SUA2014/SKR/0050
RUJUKAN ANDA: -

TARIKH: 4 Ogos 2014

YBhg Dato' Mustafa Ali
Setiausaha Agung
Parti Islam Se-Malaysia
Pejabat Agung
No 318-A
Jalan Raja Laut
50350 Kuala Lumpur

YBhg Dato',

PENCALONAN YB DATO' SERI DR WAN AZIZAH WAN ISMAIL SEBAGAI MENTERI BESAR SELANGOR

Saya mendoakan perjuangan kita terus mendapat petunjuk dan rahmat Allah SWT demi harapan rakyat yang kita pikul bersama.

Berikutan perbincangan berterusan mengenai keputusan KEADILAN mencalonkan YB Dato' Dr Wan Azizah Wan Ismail sebagai Menteri Besar Selangor yang baru, saya telah mengunjungi beberapa pimpinan termasuklah YBhg Dato' Bentara Setia Haji Nik Abdul Aziz Nik Mat, Tuan Haji Mohamad Bin Sabu, Dato' Tuan Ibrahim Tuan Man dan Dato' Haji Husam Musa sepanjang minggu lepas. Pada akhir pertemuan yang diadakan saya memahami ada keperluan untuk KEADILAN memberikan beberapa penjelasan dan menerangkan isu berbangkit yang mendorong kepada keputusan KEADILAN mencalonkan Dato' Seri Dr Wan Azizah Wan Ismail sebagai Menteri Besar Selangor yang baru.

Sesuai dengan semangat itu, untuk mengelakkan pelbagai tohmah dan versi yang berlainan yang sampai kepada pimpinan PAS sehingga menimbulkan kesukaran untuk mengetahui apakah sebab sebenarnya keputusan KEADILAN untuk menukar Menteri Besar Selangor dibuat, bersama-sama ini saya sertakan laporan ringkas berserta rujukan yang berkenaan yang merumuskan beberapa peristiwa dan tindakan yang menjadi antara sebab musabab utama KEADILAN secara konsensus mengambil keputusan menggantikan kepimpinan Menteri Besar Selangor sedia ada.

Saya memohon jasa baik YBhg Dato' untuk memanjangkan laporan ini kepada keseluruhan AJK PAS Pusat yang akan bermesyuarat pada 10 Ogos 2014 mengenai perkara ini. KEADILAN juga akan menghantar terus laporan ringkas berserta rujukan ini kepada kesemua YDP PAS Kawasan dan kesemua wakil rakyat PAS di seluruh negara agar perkara in dapat difahami seadilnya.

Saya berdoa agar perkara-perkara yang diketengahkan di dalam laporan ringkas ini dapat dihadam sepenuhnya oleh pimpinan PAS di setiap peringkat demi kebersamaan dan kepentingan mempertahankan Pakatan Rakyat.

Selamat menyambut bulan Syawal dan wassalam.

Yang menjalankan amanah

DATO' SAIFUDDIN NASUTION ISMAIL
Setiausaha Agung KEADILAN

Salinan Kepada:

YB Dato' Seri Anwar Ibrahim
Ketua Umum KEADILAN

YBhg Dato' Bentara Setia Haji Nik Abdul Aziz Nik Mat
Mursyidul Am PAS

YB Dato' Seri Abdul Hadi Awang
Presiden PAS

YB Saudara Lim Kit Siang
Ketua Parlimen DAP

YB Dato' Seri Dr Wan Azizah Wan Ismail
Presiden KEADILAN

YAB Saudara Lim Guan Eng
Setiausaha Agong DAP

YAB Tan Sri Abdul Khalid Ibrahim
Menteri Besar Selangor

Ahli Majlis Pimpinan Pusat KEADILAN

AJK PAS Pusat

Ahli CEC DAP

Ahli Parlimen Pakatan Rakyat

ADUN Pakatan Rakyat

YDP PAS Selangor

LATAR BELAKANG

KEADILAN telah mencapai persetujuan sebulat suara di dalam Majlis Pimpinan Pusat (MPP) yang bersidang pada 21 Julai 2014 untuk menggantikan Menteri Besar Selangor sedia ada iaitu YAB Tan Sri Khalid Ibrahim. Persetujuan sebulat suara itu juga mencalonkan YB Dato' Seri Dr Wan Azizah Wan Ismail, Presiden KEADILAN sebagai Menteri Besar Selangor yang baru untuk menggantikan YAB Tan Sri Khalid Ibrahim.

Keputusan ini kemudiannya dibawa ke mesyuarat Majlis Pimpinan Pakatan Rakyat pada 23 Julai 2014 dan dimaklumkan secara rasmi kepada PAS dan DAP. PAS dan DAP di dalam kenyataan bersama yang dikeluarkan selepas mesyuarat itu bersetuju pada dasarnya bahawa prinsip pencalonan jawatan Menteri Besar Selangor adalah dari KEADILAN[1].

DAP telah menyatakan sokongan secara terbuka kepada pencalonan YB Dato' Seri Dr Wan Azizah Wan Ismail[2] sementara PAS akan membincangkan pendirian dalam mesyuarat AJK PAS Pusat pada 10 Ogos 2014.

Laporan ini ditulis sebagai mengambil pandangan pimpinan-pimpinan PAS yang memberikan gambaran timbul keperluan KEADILAN memberikan sebab musabab secara rasmi kepada PAS yang mendorong keputusan KEADILAN untuk menukar Menteri Besar Selangor.

Laporan ini disediakan oleh ibu pejabat KEADILAN dan diluluskan oleh pimpinan tertinggi KEADILAN. Ia berdasarkan maklumat dari laporan Kerajaan Negeri dan Pusat, carian umum, rekod rasmi mahkamah, syarikat dan urusniaga, keterangan yang diberikan oleh individu yang terbabit serta laporan-laporan media mengenai isu ini.

KERAGUAN MUNASABAH MENGENAI PENYELESAIAN MASALAH HUTANG BANK ISLAM BERJUMLAH USD18,521,806.13 (BERSAMAAN RM59.5 JUTA SETAKAT 13 NOVEMBER 2006) DAN FAEDAH KE ATASNYA

Masalah keberhutangan YAB Tan Sri Khalid Ibrahim dengan Bank Islam sudah diketahui umum sejak beliau belum menjadi ahli politik dan Menteri Besar. Sebelum tahun 2011, beliau juga pernah berunding dengan YB Dato' Seri Anwar Ibrahim sendiri jalan untuk menyelesaikan tindakan Bank Islam terhadapnya dengan baik.

Keberhutangan YAB Tan Sri Khalid Ibrahim dengan Bank Islam bermula dalam tahun 90an semasa beliau menjadi Ketua Pegawai Eksekutif (CEO) Kumpulan Guthrie Berhad. Bank Islam pada mulanya meluluskan kemudahan pembiayaan *al-murabaha* kepada YAB Tan Sri Khalid Ibrahim untuk membeli saham-saham dalam Kumpulan Guthrie Berhad.

---

[1] Kenyataan Bersama Majlis Pimpinan PR, 23 Julai 2014

[2] Minit mesyuarat Majlis Setiausaha PR (7 Julai 2014), laporan-laporan akhbar termasuk yang terbaru "DAP backs woman as MB, asks others to follow" (Malaysiakini, 1 Ogos 2014)

YAB Tan Sri Khalid gagal membayar bayaran pinjaman pertama di bawah kemudahan pembiayaan *al-murabaha* ini yang sepatutnya dilunaskan pada 24 Oktober 1998. Beliau menulis secara rasmi melalui satu surat bertarikh 16 Oktober 1998 untuk menangguhkan bayaran tertunggak tersebut. Seterusnya beliau sekali lagi gagal melunaskan bayaran pinjaman pertama dari pinjaman kedua di bawah kemudahan pembiayaan *al-murabaha* dan memohon untuk menangguhkan juga bayaran tersebut melalui satu surat bertarikh 20 Oktober 1999.

Oleh kerana kegagalan berterusan untuk melunaskan hutang yang diambil melalui kemudahan pembiayaan *al-murabaha* ini, Bank Islam dan YAB Tan Sri Khalid bersetuju untuk menstrukturkan kembali hutang-hutang ini melalui satu kemudahan pembiayaan yang baru.

Maka pada tahun 2001, Bank Islam meluluskan penstrukturan hutang-hutang itu melalui kemudahan pembiayaan Islam *al-Bai Bithaman Ajil* ("BBA") kepada YAB Tan Sri Khalid. Terma kemudahan pembiayaan ini dimuktamadkan di dalam Surat Tawaran (bertarikh 17 April 2001), Perjanjian Induk Kemudahan BBA (bertarikh 30 April 2001) dan perjanjian-perjanjian jual beli mengikut BBA (bertarikh 30 April 2001).

Terma-terma utama perjanjian pinjaman BBA yang ditandatangani adalah seperti berikut:

1. Bank Islam membeli 39,681.562 saham Guthrie Berhad milik YAB Tan Sri Khalid Ibrahim pada harga USD56.5 juta (bersamaan RM214.7 juta) sebagai cagaran kepada hutang tertunggak YAB Tan Sri Khalid Ibrahim kepada Bank Islam

2. Sebagai mematuhi kaedah pembiayaan BBA, Bank Islam akan menjual kembali saham-saham ini kepada YAB Tan Sri Khalid Ibrahim pada harga kos pinjaman dan kadar keuntungan 0.75%

3. Urusniaga jual-beli saham (YAB Tan Sri Khalid Ibrahim membeli balik saham untuk membayar pembiayaan) mengikut kaedah pembiayaan BBA ini akan dijalankan setiap 6 bulan agar YAB Tan Sri Khalid dapat melunaskan hutang-hutang asalnya yang telah distrukturkan melalui pencagaran saham-saham itu

4. Sekiranya YAB Tan Sri Khalid Ibrahim gagal membeli kembali saham-saham ini mengikut perjanjian, Bank Islam berhak untuk menjual saham-saham ini untuk mendapatkan kembali hutang tertunggak

Setelah menandatangi perjanjian kemudahan pembiayaan BBA bertarikh 30 April 2001 ini, YAB Tan Sri Khalid sekali lagi engkar dengan perjanjian dan gagal membeli kembali saham-sahamnya untuk melunaskan hutang seperti yang ditetapkan perjanjian. Bank Islam mula menjual saham-saham itu seperti yang diperuntukkan di dalam perjanjian untuk mengutip kembali hutang yang telah diambil oleh YAB Tan Sri Khalid Ibrahim.

Setelah proses melupuskan saham yang dicagarkan ini berjalan, Bank Islam mendapati hutang YAB Tan Sri Khalid Ibrahim masih berbaki sebanyak USD18,521,806.12 (bersamaan RM59.5

juta setakat 13 November 2006). Bank Islam telah menghantar notis agar jumlah ini dibayar oleh YAB Tan Sri Khalid Ibrahim melalui 2 notis bertarikh 18 Julai 2005 dan 4 Ogos 2005[3].

Ekoran dari notis menuntut hutang itu, pada 10 Mei 2007 YAB Tan Sri Khalid Ibrahim memfailkan saman sivil di Mahkamah Tinggi terhadap Bank Islam bersabit kemudahan pembiayaan BBA ini. Saman beliau menuntut agar Mahkamah Tinggi mengisytiharkan bahawa:

1. Mengikut Akta Perbankan Islam 1983, Bank Islam tiada lesen untuk memeterai perjanjian kemudahan BBA seperti yang ditandatangani dengan YAB Tan Sri Khalid Ibrahim

2. Kemudahan BBA seperti yang ditawarkan oleh Bank Islam tidak mengikut syariat Islam dan oleh itu Bank Islam melanggar syarat-syarat lesen perbankan Islamnya[4]

Pada 24 Mei 2007, Bank Islam memfailkan saman di Mahkamah Tinggi menuntut baki hutang dari YAB Tan Sri Khalid Ibrahim kerana melanggar syarat perjanjian kemudahan pembiayaan BBA.

Kedua-dua saman ini akhirnya dibicarakan sekaligus sehinggalah proses undang-undang dihentikan secara tiba-tiba dalam Februari 2014.

Keputusan Mahkamah

Sepanjang kes ini dibawa dan dibicarakan di mahkamah, keputusan secara keseluruhannya memihak kepada Bank Islam.

Kronologi keputusan mahkamah adalah seperti berikut:

1. Pada 21 Ogos 2009, Hakim Mahkamah Tinggi YA Rohana Yusuf membenarkan permohonan Bank Islam untuk mendapatkan balik baki hutang seperti permohonan saman yang difailkan tanpa perlu dibicarakan. YA Rohana Yusuf dalam penghakimannya merujuk kepada pengakuan YAB Tan Sri Khalid Ibrahim sendiri yang tidak menafikan bahawa beliau berhutang dengan Bank Islam[5] (perenggan 25 dan 26 penghakiman).

2. YAB Tan Sri Khalid Ibrahim memfailkan rayuan terhadap keputusan itu.

3. Pada 3 Mac 2010, Mahkamah Rayuan membenarkan rayuan Tan Sri Khalid Ibrahim dan mengarahkan supaya kes itu dibicarakan secara penuh di Mahkamah Tinggi. Tarikh

---

[3] Kesemua fakta ini terkandung di dalam penghakiman YA Hakim Rohana Yusuf dalam kes bernombor D4-22A-216-2007 dan D4-22A-217-2007 bertarikh 21 Ogos 2009 (perenggan 3 hingga 8) yang disertakan bersama di dalam lampiran

[4] Perenggan 4 penghakiman YA Datuk Wira Low Hop Bing semasa menolak rayuan YAB Tan Sri Khalid Ibrahim di Mahkamah Rayuan kes bernombor W-02(IM)-3019-12/2011 yang disertakan bersama di dalam lampiran

[5] Ibid

perbicaraan ditetapkan pada 2 hingga 4 Ogos 2010, 9 hingga 11 Ogos 2010 dan 23 hingga 26 Ogos 2010.

4. Pada 9 Ogos 2010, YAB Tan Sri Khalid Ibrahim memfailkan permohonan untuk melucutkan kelayakan hakim YA Rohana Yusuf dari mendengar kes itu.

5. Pada 22 September 2010, Mahkamah Tinggi menolak permohonan YAB Tan Sri Khalid Ibrahim untuk melucutkan kelayakan hakim YA Rohana Yusuf. YAB Tan Sri Khalid Ibrahim memfailkan rayuan terhadap keputusan tersebut.

6. Pada 1 November 2010, Mahkamah Rayuan membenarkan rayuan YAB Tan Sri Khalid dan mengarahkan kes ini dibicarakan di hadapan hakim yang baru iaitu YA Dato' Mohd Zawawi Salleh. Perbicaraan kes ditetapkan untuk didengari pada tarikh-tarikh 11 hingga 14 Julai 2011, 18 hingga 21 Julai 2011 dan 25 hingga 28 Julai 2011.

7. Semasa perbicaraan, oleh kerana kes pembelaan YAB Tan Sri Khalid Ibrahim bersandarkan sepenuhnya kepada persoalan syariah (sama ada pembiayaan BBA itu mengikut lunas Islam atau tidak), Bank Islam memfailkan permohonan kepada hakim supaya persoalan-persoalan ini diputuskan oleh Majlis Penasihat Syariah Bank Negara Malaysia (BNM) mengikut peruntukan Seksyen 56 Akta Bank Negara Malaysia. Permohonan ini dibantah oleh YAB Tan Sri Khalid Ibrahim.

8. Dalam penghakiman bertarikh 2 Disember 2011, hakim YA Dato' Mohd Zawawi Salleh membenarkan permohonan Bank Islam[6] agar Majlis Penasihat Syariah BNM dirujuk untuk menentukan sama ada hujah YAB Tan Sri Khalid Ibrahim bahawa pembiayaan BBA yang ditandatanganinya itu tidak berunsurkan Islam. Ini bermakna, sekiranya Majlis Penasihat Syariah BNM memutuskan bahawa kemudahan pembiayaan BBA yang ditawarkan oleh Bank Islam menepati ciri-ciri perbankan Islam, pembelaan YAB Tan Sri Khalid Ibrahim akan terbatal dan beliau perlu membayar jumlah baki hutangnya kepada Bank Islam.

9. Pada 8 Disember 2011, YAB Tan Sri Khalid Ibrahim memfailkan rayuan terhadap keputusan hakim YA Dato' Mohd Zawawi Salleh yang membenarkan rujukan kepada Majlis Penasihat Syariah BNM.

10. Pada 14 Mei 2012, Mahkamah Rayuan menolak rayuan YAB Tan Sri Khalid Ibrahim[7]. Ini bermakna keputusan sama ada YAB Tan Sri Khalid Ibrahim perlu membayar baki hutangnya tetap bergantung kepada keputusan Majlis Penasihat Syariah BNM sama ada kemudahan BBA yang ditawarkan Bank Islam adalah berunsurkan perbankan Islam atau tidak.

---

[6] Rujuk laporan kes yang terkandung di dalam Malaysian Law Journal (MLJ) yang disertakan bersama

[7] Ibid

11. Berikutan keputusan itu, YAB Tan Sri Khalid membuat permohonan rayuan di Mahkamah Persekutuan. Pendengaran kes pada mulanya ditetapkan pada 24 April 2013 tetapi ditangguhkan beberapa kali ke tarikh-tarikh 2 September 2013 (tangguh), 21 Oktober 2013 (tangguh) dan 12 Februari 2014.

12. Dalam bulan Februari 2014, Mahkamah Persekutuan dimaklumkan bahawa plaintif dan defendan mahu menyelesaikan kes di luar mahkamah dan perbicaraan tidak diteruskan.

13. Dalam pengurusan kes pada 31 Mac 2014, kedua-dua pihak memaklumkan secara rasmi kepada Mahkamah Persekutuan bahawa tindakan mahkamah tidak akan diteruskan.

Keraguan Bersabit Integriti YAB Tan Sri Khalid Ibrahim Berikutan Pelupusan Hutang RM70 juta Secara Mengejut

Sejak dari awal, YAB Tan Sri Khalid Ibrahim tidak pernah menafikan bahawa beliau berhutang dengan Bank Islam. Malah, perkara ini turut dijadikan asas penghakiman YA Rohana Yusuf yang menyebut bahawa "Tan Sri Khalid beberapa kali mengaku bahawa beliau mempunyai tanggungjawab untuk membayar hutang-hutang yang diambil di bawah pembiayaan *al-murabaha* dan *al-bai bithaman ajil*"[8].

Pada masa yang sama, Bank Islam mempunyai hujah yang kukuh untuk memenangi kes di mahkamah yang akan memaksa YAB Tan Sri Khalid Ibrahim membayar baki hutangnya. Satu-satunya pembelaan yang dibawa oleh YAB Tan Sri Khalid Ibrahim ialah cuba menimbulkan keraguan bahawa pembiayaan *al-bai bithaman ajil* yang disediakan oleh Bank Islam tidak memenuhi syariah sepenuhnya. Atas hujah itu, YAB Tan Sri Khalid Ibrahim cuba mendapatkan arahan mahkamah untuk membatalkan perjanjian pinjaman BBA yang ditandatangani sebelum itu dengan Bank Islam.

Jika hujah YAB Tan Sri Khalid Ibrahim itu diterimapakai, bermakna semua pinjaman yang dibuat di bawah kaedah BBA perbankan Islam yang diambil oleh semua rakyat Malaysia juga perlu diisytiharkan tidak sah dan terbatal. Ini termasuk pinjaman rumah dan pelbagai pinjaman lain yang banyak dibuat oleh rakyat kebanyakan di bawah kaedah BBA.

Malah, YA Dato' Mohd Zawawi Salleh menulis di dalam penghakimannya hujah Bank Islam bahawa di bawah undang-undang sivil dan syariah, pihak yang memeterai perjanjian adalah terikat dengan perjanjian itu (*aufu bit uqud*) dan Tan Sri Khalid Ibrahim adalah tidak terkecuali dari prinsip undang-undang ini[9].

Kronologi keputusan mahkamah juga jelas menunjukkan bahawa Bank Islam mempunyai kes yang kukuh dan mahkamah telah berpihak kepada Bank Islam dalam penghakiman-penghakiman di peringkat Mahkamah Tinggi dan Mahkamah Rayuan.

---

[8] Ibid

[9] Ibid, para 14

Oleh yang demikian, apabila Bank Islam tiba-tiba secara mengejut memutuskan untuk tidak meneruskan kes di mahkamah dalam keadaan ia mempunyai kedudukan yang kukuh, ia menimbulkan banyak tanda tanya. Tindakan Bank Islam tidak meneruskan kes yang bakal dimenanginya untuk mengutip hutang dari si penghutang adalah satu keputusan luar biasa yang sangat jarang berlaku kepada rakyat biasa.

Rundingan di antara Bank Islam dengan YAB Tan Sri Khalid Ibrahim untuk menyelesaikan tuntutan hutang ini diluar mahkamah juga dibuat di luar pengetahuan peguam Bank Islam iaitu Tetuan Tommy Thomas[10]. Tetuan Tommy Thomas hanya tahu keputusan Bank Islam untuk menggugurkan saman tuntutan baki hutang melibatkan YAB Tan Sri Khalid Ibrahim di saat-saat akhir pada pertengahan Februari 2014 dan beliau langsung tidak terlibat dalam sebarang rundingan untuk menyelesaikan tuntutan ini (seperti lazimnya yang mana peguam terlibat sama merundingkan sebarang penyelesaian di luar mahkamah).

Keraguan munasabah mula timbul apabila maklumat yang diperolehi dari pejabat YAB Tan Sri Khalid Ibrahim dan sumber Bank Islam seawal Januari 2014 menyebut bahawa penyelesaian di luar mahkamah di antara Bank Islam dan YAB Tan Sri Khalid Ibrahim dirundingkan oleh seorang tokoh korporat dan peguam bernama Tan Sri Rashid Manaf sebagai orang tengah. Akhirnya Setiausaha Politik YAB Tan Sri Khalid Ibrahim sendiri mengesahkan bahawa Menteri Besar ada beberapa kali berjumpa dengan Tan Sri Rashid Manaf untuk merundingkan penyelesaian hutangnya[11].

Setelah berita Bank Islam menggugurkan tindakan saman tuntutan hutang terhadap YAB Tan Sri Khalid Ibrahim ini disahkan pada 13 Februari 2014 (apabila kes rayuan di Mahkamah Persekutuan tidak didengari walaupun tarikh telah ditetapkan pada 12 Februari 2014), keraguan munasabah ini menjadi lebih kuat dan mempunyai asas apabila dilihat dari perspektif empat perkara iaitu:

1. Tan Sri Rashid Manaf adalah seorang tokoh korporat yang rapat dengan Umno. Beliau adalah bekas peguam Tun Daim Zainuddin dan dikenali sebagai "orang Daim"[12]

2. Dalam bulan Mac 2014 iaitu sebulan selepas Bank Islam bersetuju menggugurkan tuntutan baki hutang di mahkamah, Ecoworld Berhad iaitu syarikat pemaju yang berhubungkait dengan Tan Sri Rashid Manaf memeterai perjanjian-perjanjian melibatkan projek dan hartanah Kerajaan Selangor bernilai ratusan juta ringgit (akan dihuraikan lebih lanjut dalam bab seterusnya). Tan Sri Rashid Manaf adalah pengerusi Lembaga Pengarah dan pemegang saham utama Ecoworld Berhad

---

[10] Rujuk laporan The Edge, 13 Februari 2014 "Cancellation of Bank Islam – Khalid suits prompts political speculations". Tetuan Tommy Thomas tidak pernah menyatakan bahawa beliau terlibat di dalam rundingan penyelesaian di luar mahkamah

[11] Saudara Azman Bidin, percakapan telefon 29 Julai 2014, selain maklumat dalaman industri perbankan yang disampaikan kepada parti

[12] The Edge 17 Februari 2014 "PDZ's asset acquisition is off" dan Kinibiz 17 Februari 2014 "How powerful is Daim Zainuddin?"

3. Tan Sri Khalid Ibrahim menyegerakan menandatangani Memorandum Persefahaman (MOU) penstrukturan air dengan Kerajaan Persekutuan pada 26 Februari 2014 tanpa merujuk kepada pimpinan KEADILAN atau Pakatan Rakyat. Tan Sri Khalid Ibrahim juga mengakui bahawa MOU itu tidak pernah dibentangkan sebagai satu kertas EXCO untuk diluluskan, sebaliknya hanya dimaklumkan sebagai sebahagian dari agenda mesyuarat EXCO[13]. Isi kandungan MOU itu dipertikaikan oleh banyak pihak kerana dilihat berat sebelah apabila hanya mengikat komitmen Kerajaan Selangor untuk meluluskan Projek Langat 2 sedangkan tidak mempunyai apa-apa komitmen undang-undang di pihak Kerajaan Persekutuan (akan dihuraikan lebih lanjut dalam bab seterusnya)

4. Perlakuan Tan Sri Khalid Ibrahim yang berbaik-baik dengan pimpinan Barisan Nasional dan muncul berkali-kali di dalam media Barisan Nasional membuat kenyataan yang merugikan KEADILAN dan Pakatan Rakyat di dalam minggu-minggu kritikal sebelum penamaan calon Plihanraya Kecil Kajang (minggu di antara 23 Februari 2014 hingga 9 Mac 2014). Ini memberi ruang kepada media Barisan Nasional menyerang hebat kepimpinan KEADILAN terutamanya Dato' Seri Anwar Ibrahim yang dipercayai dirancang sebagai persiapan menangani sentimen rakyat apabila beliau dijatuhkan hukuman bersalah oleh Mahkamah Rayuan. Serangan ke atas Dato' Seri Anwar Ibrahim yang turut berpunca dari ruang yang dibuka sendiri oleh YAB Tan Sri Khalid Ibrahim itu memuncak pada 7 Mac 2014 apabila Mahkamah Rayuan menjatuhkan hukuman bersalah terhadap Dato' Seri Anwar Ibrahim

Siasatan ke atas garis masa peristiwa-peristiwa yang berlaku merumuskan kesimpulan berikut:

1. Rundingan menyelesaikan tuntutan hutang di luar mahkamah dipercepatkan selepas KEADILAN mengumumkan *Kajang Move* pada 28 Januari 2014. Sebelum pengumuman dibuat, YAB Tan Sri Khalid Ibrahim telah terlebih dahulu dimaklumkan keputusan dan permintaan parti pada 26 Januari 2014 supaya beliau berundur dan beliau menyatakan persetujuan kepada keputusan parti itu[14]

2. Sebaik sahaja *Kajang Move* diumumkan, berita mula berlegar bahawa berlaku rundingan di antara YAB Tan Sri Khalid Ibrahim dan Bank Islam untuk menyelesaikan tuntutan hutang Bank Islam diluar mahkamah yang diuruskan oleh Tan Sri Rashid Manaf

3. Pada 13 Februari 2014 iaitu 2 minggu selepas *Kajang Move* diumumkan, pendengaran kes rayuan tuntutan hutang Bank Islam terhadap YAB Tan Sri Khalid Ibrahim di Mahkamah Persekutuan tidak diteruskan dan mahkamah dimaklumkan bahawa kedua-dua pihak sedang merundingkan penyelesaian di luar mahkamah

---

[13] Taklimat penstrukturan air dan MOU air oleh YAB Tan Sri Khalid Ibrahim kepada wakil-wakil rakyat Pakatan Rakyat, 5 Mac 2014

[14] Mesyuarat di antara Dato' Seri Anwar Ibrahim, Dato' Seri Dr Wan Azizah Wan Ismail dan Tan Sri Khalid Ibrahim di kediaman Dato' Seri Anwar Ibrahim antara jam 11 pagi hingga 12 tengahari 26 Januari 2014

4. Pada 26 Februari 2014, YAB Tan Sri Khalid Ibrahim tiba-tiba mengumumkan bahawa satu MOU penstrukturan air telah ditandatangani di antara Kerajaan Selangor dan Kerajaan Persekutuan

5. Pada 27 Februari 2014, Pendaftar Mahkamah Rayuan memanggil peguambela Dato' Seri Anwar Ibrahim untuk memaklumkan bahawa pengurusan kes beberapa permohonan rayuan bersabit kes Dato' Seri Anwar Ibrahim akan didengari pada pagi itu juga

6. Pada 28 Februari 2014, secara luar biasa hakim YA Dato' Aziah Ali telah mengendalikan sendiri pengurusan kes Dato' Seri Anwar Ibrahim. Beliau mengejutkan peguambela dengan membuat keputusan untuk mempercepatkan pendengaran-pendengaran rayuan kes Dato' Seri Anwar pada 3 Mac 2014 dan 6 hingga 7 Mac 2014 sedangkan tarikh perbicaraan telah pun ditetapkan pada 7 hingga 10 April 2014 sebelum itu

7. Pada 7 Mac 2014, Mahkamah Rayuan membenarkan rayuan pendakwaraya terhadap Dato' Seri Anwar Ibrahim dan menjatuhkan hukuman bersalah terhadap beliau sekaligus menghilangkan kelayakan beliau untuk bertanding di dalam Pilihanraya Kecil Kajang

8. Pada 19 Mac 2014, Tropicana Corporation Berhad mengumumkan bahawa ia telah menjual 308.72 ekar tanah yang dibelinya dari Kerajaan Selangor (dalam bulan April 2013) kepada Ecoworld Berhad. Ini bermakna sebanyak 308.72 ekar tanah milik Kerajaan Selangor akhirnya dipindahmilik ke syarikat yang dikuasai oleh Tan Sri Rashid Manaf[15]

9. Pada 25 Mac 2014, YAB Tan Sri Khalid Ibrahim menandatangani satu lagi MOU dengan Ecoworld Berhad yang menganugerahkan projek pembinaan 2,400 unit rumah pangsa mampu milik di bawah Kerajaan Selangor yang dianggarkan bernilai RM591 juta kepada Ecoworld Berhad[16]

10. Pada 31 Mac 2014, Bank Islam dan YAB Tan Sri Khalid Ibrahim memaklumkan kepada mahkamah semasa pengurusan kes bahawa kedua-dua pihak bersetuju untuk tidak meneruskan tindakan undang-undang berikutan penyelesaian di luar mahkamah yang telah dicapai[17]

11. Pada 23 April 2014, Bank Islam memfailkan *circular resolution* kepada pemegang saham sebagai sebahagian dari peraturan Bursa Malaysia. Ia turut menyenaraikan perjalanan kes tuntutan baki hutang dari YAB Tan Sri Khalid Ibrahim. *Circular resolution* itu turut mengesahkan bahawa Bank Islam telah bersetuju menggugurkan tuntutan saman baki

---

[15] The Edge Malaysia 20 Mac 2014, "Tropicana sells land to Eco World"

[16] The Star 25 Mac 2014, "More affordable homes for Selangor folk"

[17] Rujuk *Circular Resolution* kepada pemegang saham Bank Islam Malaysia Berhad bertarikh 23 April 2014 yang menyenaraikan kes-kes guaman besar di antara Bank Islam dan penghutang yang difailkan di Bursa Malaysia. Rujuk Lampiran I, Perkara 3 perenggan (d) muka surat 21. Petikan *Circular Resolution* ini dilampirkan bersama sebagai bukti

hutang dari YAB Tan Sri Khalid Ibrahim walaupun "peguam Bank Islam berpendapat Bank Islam mempunyai kes yang kuat terhadap lawan"[18]

Kesemua fakta-fakta ini menimbulkan keraguan terhadap integriti YAB Tan Sri Khalid Ibrahim dan mengundang pelbagai spekulasi terutamanya dari kalangan media. Pihak media mula mengajukan pelbagai soalan kepada YAB Tan Sri Khalid Ibrahim untuk mendedahkan terma dan syarat-syarat penyelesaian hutangnya yang mencecah RM70 juta (baki hutang pokok dan faedah).

Mengambil kira pelbagai kontroversi dan spekulasi ini, pimpinan parti termasuk Dato' Seri Anwar Ibrahim memohon supaya YAB Tan Sri Khalid Ibrahim berlaku telus dan menjelaskan kepada pimpinan parti dan Pakatan Rakyat terma-terma utama penyelesaian hutangnya dengan Bank Islam untuk menghentikan spekulasi.

YAB Tan Sri Khalid Ibrahim Enggan Berterus Terang Mengenai Pelupusan Hutang RM70 juta Secara Mengejut

Sikap YAB Tan Sri Khalid Ibrahim mengenai penyelesaian hutangnya dan pelbagai spekulasi menunjukkan beliau tidak mahu berlaku telus. Sehingga ke hari ini, beliau masih belum membuat penjelasan kepada pimpinan KEADILAN mengenai perkara itu walaupun dinasihatkan.

Semasa diasak oleh pihak media, jawapan beliau ialah "penyelesaian hutang itu adalah soal peribadi beliau dan beliau tidak perlu memberi penjelasan". Pendirian ini dikecam oleh pihak media terutamanya penerbitan perniagaan utama negara iaitu The Edge yang menegaskan bahawa kedudukan beliau sebagai seorang Menteri Besar menyebabkan perkara seperti penyelesaian hutang beliau menjadi perkara berkepentingan awam.

KEADILAN telah memberikan beberapa kali memberikan arahan kepada YAB Tan Sri Khalid Ibrahim untuk membuat penjelasan kepada pimpinan parti dan Pakatan Rakyat tetapi tidak dihiraukan. Tambahan pula, YAB Tan Sri Khalid Ibrahim jarang sekali menghadiri apa-apa mesyuarat parti dan ini menyukarkan lagi usaha untuk mendapat penjelasan dari beliau setelah spekulasi mula bertiup kencang bahawa beliau berunding dengan tokoh yang rapat dengan Umno untuk menyelesaikan hutang beliau.

Rekod yang boleh disahkan menunjukkan beliau hanya pernah menerangkan mengenai hutang beliau ini sebanyak satu kali kepada pimpinan Pakatan Rakyat iaitu dalam satu mesyuarat khas di antara beliau dan pimpinan tertinggi Pakatan Rakyat pada 6 Mac 2014 bertempat di Quality Hotel antara jam 9 malam hingga 11 malam. Mesyuarat tergempar itu dipanggil oleh Dato' Seri Anwar Ibrahim setelah YAB Tan Sri Khalid Ibrahim menandatangani MOU penstrukturan air dengan Kerajaan Pusat tanpa memberi maklumat terlebih dahulu kepada pimpinan parti sehingga menimbulkan kontroversi apabila MOU dilihat berat sebelah.

Wakil-wakil parti yang hadir di dalam mesyuarat tertutup itu adalah:

---

[18] Ibid, peranggan (e) *circular resolution*

1. Dato' Seri Anwar Ibrahim sebagai pengerusi
2. Saudara Azmin Ali (wakil KEADILAN)
3. Dato' Saifuddin Nasution Ismail (wakil KEADILAN)
4. Dato' Seri Abdul Hadi Awang (wakil PAS)
5. Dato' Mustafa Ali (wakil PAS)
6. Saudara Lim Kit Siang (wakil DAP)
7. Saudara Tan Kok Wai (wakil DAP)
8. Saudara Rafizi Ramli (dijemput untuk membincangkan perincian khusus MOU air)
9. Saudara Tony Pua (dijemput untuk membincangkan perincian khusus MOU air)

Sebagai pengerusi, Dato' Seri Anwar Ibrahim menanyakan secara khusus kepada YAB Tan Sri Khalid Ibrahim supaya beliau (Tan Sri Khalid) menerangkan sendiri terma-terma sehingga membolehkan Bank Islam menarik balik tindakan mahkamah menuntut hutang daripadanya.

Berikut adalah penjelasan yang dibuat oleh YAB Tan Sri Khalid Ibrahim kepada pimpinan tertinggi Pakatan Rakyat[19]:

> *"… bahawa beliau mempunyai kenalan dari Bank al-Rajhi dari Arab Saudi yang sudi membantu tetapi beliau perlu merahsiakannya kalau tidak urusniaga itu bocor.*
>
> *… bahawa Bank Islam bersetuju untuk menghentikan tindakan mahkamah kerana YAB Tan Sri Khalid (dalam masa satu hingga dua bulan dari tarikh itu) akan mengambil tindakan undang-undang terhadap Permodalan Nasional Berhad (PNB). Beliau yakin akan menang dan menyatakan akan mendapat wang bayaran RM300 juta dari PNB yang akan digunakan untuk melunaskan hutangnya dengan Bank Islam.*
>
> *… bahawa berdasarkan janjinya untuk mengambil tindakan terhadap PNB dan bakal menang wang RM300 juta, Bank Islam bersetuju untuk menggugurkan tindakan undang-undang menuntut hutang dari beliau."*

Penjelasan beliau itu tidak masuk akal dan tidak dapat diterima oleh pimpinan KEADILAN yang menguatkan lagi keraguan terhadap integriti beliau apabila beliau tidak dapat menerangkan dengan telus dan baik kenapa beliau diberi layanan paling istimewa oleh Bank Islam yang sudah beberapa kali menang kes terhadap beliau di mahkamah.

Tidak ada bank di dunia ini yang akan menggugurkan tuntutan hutang di mahkamah (apatah lagi dalam kes yang begitu kuat seperti kes Bank Islam terhadap YAB Tan Sri Khalid Ibrahim) atas alasan mahu menunggu tindakan mahkamah yang lain yang akan diambil oleh penghutang, seperti yang didakwa oleh YAB Tan Sri Khalid Ibrahim.

Malah, sehingga kini setelah lima bulan berlalu dari tarikh mesyuarat itu, YAB Tan Sri Khalid Ibrahim tidak mengambil sebarang tindakan mahkamah terhadap PNB seperti yang didakwanya dalam mesyuarat dengan pimpinan tertinggi Pakatan Rakyat itu.

---

[19] Keterangan ini adalah berdasarkan rekod dan minit mesyuarat oleh wakil-wakil KEADILAN yang hadir iaitu Dato' Seri Anwar Ibrahim, Dato' Saifuddin Nasution Ismail dan Saudara Rafizi Ramli. Minit dicatatkan oleh Saudara Fahmi Fadzil yang turut hadir sebagai pencatat minit pada malam itu

Sehingga kini, YAB Tan Sri Khalid Ibrahim enggan memberi penjelasan yang telus dan boleh diterima akal mengenai perkara-perkara berikut:

1. Kenapa beliau mendapat layanan istimewa sehingga hutangnya yang mencecah RM70 juta dimaafkan oleh Bank Islam?

2. Kenapa beliau merundingkan penyelesaian di luar mahkamah dengan Bank Islam melalui Tan Sri Rashid Manaf, bekas peguam Tun Daim Zainuddin?

3. Apakah terma-terma penyelesaian di luar mahkamah yang dipersetujui di antara beliau, Bank Islam dan pihak-pihak lain?

4. Kenapa beliau mengambil tindakan (dalam isu air dan penganugerahan kontrak/penjualan aset) yang dianggap sebagai serong dan menimbulkan syak wasangka secara mengejut dalam dua minggu selepas Bank Islam bersetuju untuk tidak meneruskan kes tuntutan hutang di mahkamah?

5. Kenapa beliau membuat kenyataan dan muncul dalam media Barisan Nasional yang memberi ruang kepada Barisan Nasional menyerang KEADILAN dalam 2 minggu sebelum hukuman dijatuhkan kepada Dato' Seri Anwar Ibrahim?

6. Apakah benar dakwaan dan maklumat bahawa sebagai tukaran kepada penyelesaian hutang RM70 juta beliau, antara lain beliau perlu bersetuju dengan penstrukturan air termasuk memberikan kelulusan serta merta kepada Projek Langat 2?

Sebagai parti yang pernah melalui kesukaran akibat pengkhianatan dari bekas-bekas wakil rakyatnya yang melompat, sudah menjadi kebiasaan pimpinan KEADILAN untuk mengambil berat mengenai dakwaan dan tindakan wakil rakyatnya yang menimbulkan syak wasangka.

Keengganan YAB Tan Sri Khalid Ibrahim memberi penjelasan yang masuk akal dan berlaku telus dalam soal penyelesaian hutang banknya yang bernilai RM70 juta itu, terutamanya setelah tindakan-tindakan beliau yang terburu-buru dalam tempoh sebulan selepas tindakan mahkamah dihentikan oleh Bank Islam, menguatkan kesimpulan pimpinan KEADILAN bahawa ada keraguan munasabah yang mempersoalkan integriti YAB Tan Sri Khalid Ibrahim.

KEADILAN mengambil ketetapan bahawa tidak ada kompromi dalam persoalan integriti. Oleh itu, atas kegagalan dan keengganan beliau memberi penjelasan dan bukti yang munasabah untuk mempertahankan integriti beliau, ada asas yang kukuh untuk melucutkan YAB Tan Sri Khalid Ibrahim dari jawatan sebagai Menteri Besar Selangor.

URUSNIAGA MELIBATKAN KERAJAAN SELANGOR DAN ECOWORLD BERHAD YANG DIKAWAL OLEH TAN SRI RASHID MANAF

Penglibatan Tan Sri Rashid Manaf sebagai "orang tengah" yang merundingkan penyelesaian hutang bank berjumlah RM70 juta dengan Bank Islam menimbulkan keraguan terhadap integriti YAB Tan Sri Khalid Ibrahim.

Keraguan ini diperkuatkan lagi apabila Kerajaan Selangor disabitkan di dalam dua urusniaga berjumlah ratusan juta ringgit yang memberi keuntungan kepada Ecoworld Berhad iaitu syarikat yang dikawal oleh Tan Sri Rashid Manaf sebagai pengerusi dan pemegang saham utama.

Dua urusniaga tersebut adalah seperti berikut:

1. Pada 19 Mac 2014, Tropicana Corporation Berhad mengumumkan bahawa ia telah menjual 308.72 ekar tanah yang dibelinya dari Kerajaan Selangor (dalam bulan April 2013) kepada Ecoworld Berhad.

   Tanah seluas 308.72 ekar ini adalah sebahagian dari sejumlah 1,172 ekar tanah milik Kerajaan Selangor yang dijual kepada Tropicana Corporation Berhad dalam bulan April 2013.

   Pada 15 April 2013, Permodalan Negeri Selangor Berhad (PNSB) menandatangani perjanjian dengan Tropicana Corporation Berhad untuk menjual sejumlah 1,172 ekar tanah kepada Tropicana Corporation Berhad.

   Urusniaga ini menimbulkan kontroversi kerana Kerajaan Selangor menandatanganinya setelah pembubaran Parlimen diisytiharkan dan sewajarnya Kerajaan Selangor pada ketika itu adalah *caretaker government* yang tidak membuat sebarang komitmen besar. Tindakan YAB Tan Sri Khalid Ibrahim menandatangani perjanjian penjualan tanah itu telah mengundang kontroversi besar dan mencemarkan nama KEADILAN sebelum Pilihanraya Umum ke-13 walaupun parti tidak tahu menahu mengenai urusniaga tersebut.

   Kontroversi yang lebih besar ialah jadual pembayaran yang dipersetujui oleh YAB Tan Sri Khalid Ibrahim dengan Tropicana Corporation Berhad yang dilihat memberi keistimewaan besar kepada Tropicana. Walaupun tanah seluas 1,172 ekar itu dijual pada harga RM1.3 bilion, bayaran hanya perlu dibuat oleh Tropicana Corporation Berhad dalam tempoh 20 tahun dari tarikh perjanjian.

   Tropicana Corporation Berhad hanya perlu membayar deposit sebanyak RM50 juta diikuti dengan dua bayaran awal dalam tempoh enam bulan dari tarikh perjanjian. Baki RM537 juta akan dibayar dalam bayaran ansuran tahunan selama 12 tahun dari perjanjian. Baki terakhir RM458 juta hanya perlu dibayar dalam bentuk 5% pegangan dalam projek yang akan dibangunkan oleh Tropicana Corporation Berhad di atas tanah itu dalam tempoh 18 tahun akan datang[20].

[20] Laporan The Edge 27 Mac 2014, "Selangor wants full payment, now"

Permodalan Negeri Selangor Berhad (PNSB) adalah anak syarikat milik penuh Pemerbadanan Menteri Besar Selangor (MBI) iaitu agensi pelaburan milik penuh Kerajaan Selangor. Pengerusi Lembaga Pengarah MBI dan PNSB adalah YAB Tan Sri Khalid Ibrahim sendiri. Ketua Pegawai Eksekutif MBI adalah Puan Faekah Hussein, bekas Setiausaha Politik YAB Tan Sri Khalid Ibrahim dan penasihat politik utama Menteri Besar.

Tropicana Corporation Berhad dikawal dan dimiliki oleh Tan Sri Danny Tan, adik kepada Tan Sri Vincet Tan (yang dikenali kroni utama Barisan Nasional).

Belum pun kontroversi penjualan tanah itu reda kerana perjanjian berat sebelah, satu lagi kontroversi timbul apabila sebahagian tanah itu dijual pula kepada Ecoworld Berhad yang dikawal oleh Tan Sri Rashid Manaf.

Penjualan dari Tropicana Corporation Berhad kepada Ecoworld Berhad pada 19 Mac 2014 bermakna tanah seluas 308.72 ekar yang dimiliki Kerajaan Selangor akhirnya dipindahmilik kepada syarikat yang dikawal oleh Tan Sri Rashid Manaf.

Ini berlaku dalam tempoh sebulan persetujuan penyelesaian hutang di antara YAB Tan Sri Khalid Ibrahim dan Bank Islam yang rundingannya diuruskan oleh Tan Sri Rashid Manaf.

2. Pada 25 Mac 2014, YAB Tan Sri Khalid Ibrahim menandatangani satu lagi MOU dengan Ecoworld Berhad yang menganugerahkan projek pembinaan 2,400 unit rumah pangsa mampu milik di bawah Kerajaan Selangor yang dianggarkan bernilai RM591 juta kepada Ecoworld Berhad[21].

   Projek perumahan mampu milik di Sungai Sering, Ukay Perdana ini pada asalnya melalui proses tender terbuka dan sebuah syarikat lain telah dikenalpasti untuk dilantik. Proses rundingan dengan syarikat itu berlanjutan sehingga beberapa tahun selepas proses tender terbuka.

   Selepas rundingan yang berpanjangan itu, YAB Tan Sri Khalid Ibrahim mengejutkan industri apabila projek itu dianguerahkan secara tiba-tiba kepada Ecoworld Berhad yang tidak terlibat sebelum itu.

   Projek dan tanah yang terbabit dianugerahkan dalam tempoh sebulan dari tarikh penyelesaian hutang RM70 juta dengan Bank Islam yang dirundingkan oleh Tan Sri Rashid Manaf.

[21] Ibid

URUSNIAGA PENSTRUKTURAN AIR YANG DILIHAT MERUGIKAN KERAJAAN SELANGOR[22]

Perbezaan pendapat mengenai pendekatan Kerajaan Selangor di bawah kepimpinan YAB Tan Sri Khalid Ibrahim merundingkan urusniaga penstrukturan air ini berkisar kepada 3 perkara pokok:

1. Apa kaedah nilaian untuk menilai bayaran/pampasan yang adil kepada syarikat-syarikat pemegang konsesi agar syarikat-syarikat ini menyerahkan aset mereka kepada Kerajaan Selangor dalam satu urusniaga suka sama suka (*willing buyer willing seller*)

2. Berapakah jumlah bayaran yang adil kepada setiap syarikat konsesi dan dari mana wang ini boleh diperolehi untuk membayar setiap syarikat konsesi

3. Apakah terma-terma perjanjian dengan Kerajaan Persekutuan yang adil kepada rakyat Selangor untuk mengelakkan perjanjian konsesi yang membebankan rakyat dalam jangka masa panjang seperti yang ada sekarang

Sejak dari awal, YAB Tan Sri Khalid Ibrahim memilih untuk menggunakan pendekatan korporat (ala *board room deals*) untuk menyelesaikan penstrukturan ini walaupun beliau tahu ada kepentingan politik di belakang syarikat-syarikat pemegang konsesi utama iaitu Puncak Niaga dan Syabas yang dimiliki dan dikawal oleh Tan Sri Rozalli Ismail. Beliau tidak mahu menggunakan tekanan awam (*public pressure*) sebagai salah satu pendekatan untuk mendapatkan persetujuan dari syarikat-syarikat pemegang konsesi sedangkan umum mengetahui hubungkait syarikat ini dengan Umno dan Barisan Nasional.

Akibatnya, rundingan berlanjutan dan seringkali menemui kebuntuan. Pada masa yang sama, masalah bekalan air yang sering terganggu di Selangor dan Lembah Klang menjadi senjata utama terhadap Pakatan Rakyat yang dimainkan secara berterusan oleh Barisan Nasional.

Pentadbiran YAB Tan Sri Khalid Ibrahim akhirnya membuat tawaran akhir kepada pemegang-pemegang konsesi dalam Februari 2013. Tawaran kepada pemegang konsesi swasta adalah seperti berikut:

	Puncak Niaga & Syabas	Splash
Hutang yang diambilalih (RM bilion)	4.06	1.6
Pampasan keuntungan (RM bilion)	1.07	2.5

Tawaran ini ditolak oleh Puncak Niaga dan Syabas walaupun dipersetujui oleh syarikat pemegang konsesi yang lain.

[22] Maklumat lanjut penstrukturan industri air Selangor boleh diperolehi dari Lampiran (Nota Penstruturan Air Selangor) yang disertakan bersama laporan ini

Menjelang akhir 2013, YAB Tan Sri Khalid Ibrahim telah mengubahsuai tawaran asal yang dibuat dalam Februari 2013 agar lebih menguntungkan Syabas dan Puncak Niaga.

Dalam tawaran akhir yang ditandatangani dengan Kerajaan Persekutuan melalui MOU penstrukturan air, YAB Tan Sri Khalid Ibrahim telah menaikkan bayaran pampasan keuntungan kepada Tan Sri Rozalli Ismail (melalui Puncak Niaga dan Syabas yang dikawal oleh beliau) sebanyak RM568 juta.

Pada masa yang sama, YAB Tan Sri Khalid Ibrahim juga telah memotong nilaian terhadap satu lagi pemegang konsesi iaitu Splash (yang beliau sendiri muktamadkan beberapa bulan sebelum itu) sebanyak sekitar RM2 bilion, dipercayai untuk memastikan harga keseluruhan tawaran kepada syarikat-syarikat pemegang konsesi tidak terlalu jauh dari jumlah yang pernah diumumkan beliau walaupun beliau telah menaikkan jumlah pampasan kepada Puncak Niaga dan Syabas.

Maka, tawaran akhir yang ditandatangani oleh YAB Tan Sri Khalid Ibrahim dan Kerajaan Persekutuan mengikut MOU penstrukturan air pada 26 Februari 2014 adalah seperti berikut:

	Puncak Niaga & Syabas	Splash
Hutang yang diambilalih (RM bilion)	4.06	1.6
Pampasan keuntungan (RM bilion)	1.638	0.251
Perubahan tawaran dari tawaran asal Februari 2013 (RM bilion)	Dinaikkan sebanyak RM568 juta	Dikurangkan sebanyak RM2 bilion

Selain dari pertikaian mengenai nilaian pampasan kepada syarikat-syarikat pampasan, MOU yang ditandatangani oleh YAB Tan Sri Khalid Ibrahim secara tergesa-gesa tanpa mendapat kelulusan parti dan tidak dibentangkan di mesyuarat EXCO juga mengundang kontroversi kerana dilihat berat sebelah.

Mengambil kira kesemua isu-isu ini, pimpinan KEADILAN merumuskan bahawa ada isu-isu penting bersabit penstrukturan air yang menyentuh soal prinsip perjuangan KEADILAN dan Pakatan Rakyat yang perlu dijawab oleh YAB Tan Sri Khalid Ibrahim seperti berikut:

1. Apakah kewajaran membayar pampasan yang begitu tinggi kepada syarikat-syarikat pemegang konsesi kerana dasar KEADILAN dan Pakatan Rakyat menentang penggunaan wang rakyat untuk mengkayakan kroni atas nama penswastaan.

   Jumlah keseluruhan yang akan dibayar oleh Kerajaan Selangor untuk membeli pemegang konsesi akan ditanggung sepenuhnya oleh rakyat Selangor. Lebih tinggi harga tawaran, lebih tinggi kadar tarif air di masa hadapan. Tanggungjawab Kerajaan Selangor adalah memastikan harga yang paling rendah untuk memastikan kadar tarif air yang berpatutan di masa hadapan.

   Tawaran yang dibuat oleh YAB Tan Sri Khalid Ibrahim bermakna bukan sahaja pemegang-pemegang konsesi akan dibebaskan dari tanggungjawab membayar hutang

mereka (kerana hutang akan diambil alih oleh Kerajaan Persekutuan dan dibayar oleh Kerajaan Negeri secara ansuran tahunan), mereka juga diberi pampasan yang tinggi sebagai "pampasan keuntungan".

Tindakan YAB Tan Sri Khalid Ibrahim menaikkan secara tiba-tiba pampasan keuntungan kepada Tan Sri Rozalli Ismail sebanyak RM568 juta untuk mendapatkan persetujuan kroni Umno itu mengundang syak wasangka dan memangsakan rakyat.

Apatah lagi apabila nilaian syarikat-syarikat milik Tan Sri Rozalli Ismail itu menunjukkan nilai aset bersih (aset dan keuntungan ditolak hutang) adalah negatif sekiranya syarikat itu dinilai secara amalan biasa (berdasarkan aset dan hutang). Malah, sebelum ini pun dalam tahun 2011 Syabas dan Puncak Niaga telah pun diselamatkan menggunakan wang rakyat oleh Kerajaan Persekutuan apabila Kerajaan Persekutuan mengambil alih bon-bon hutangnya (dan pemegang konsesi yang lain) yang melibatkan RM6.5 bilion dana awam[23] setelah syarikat-syarikat itu dijangka gagal membayar ansuran hutang yang dijadualkan kepada pemegang bon.

Pendirian Pakatan Rakyat pada ketika itu[24] adalah syarikat pemegang konsesi yang tidak mempunyai aliran tunai yang baik untuk membayar ansuran hutang mereka seperti Syabas dan Puncak Niaga tidak wajar diselamatkan kerana tekanan untuk membayar hutang itu akan memudahkan Kerajaan Selangor merundingkan harga tawaran yang munasabah.

Jika tidak kerana tindakan Kerajaan Persekutuan menyelamatkan Syabas dan Puncak Niaga dalam tahun 2011, syarikat-syarikat ini telah pun muflis dan boleh diambilalih dengan lebih mudah bagi tujuan penstrukturan air.

Oleh sebab itulah, keputusan YAB Tan Sri Khalid Ibrahim menaikkan bayaran pampasan sehingga RM568 juta dan menjadikan pampasan keseluruhan sebanyak RM1,638 juta dikira bertentangan dengan prinsip perjuangan KEADILAN dan Pakatan Rakyat.

Pada pandangan pimpinan KEADILAN, membayar pampasan keuntungan sebanyak RM1,638 juta kepada kroni bagi syarikat yang hampir muflis tidaklah berbeza dengan tindakan-tindakan BN dalam siri *bail out* seperti menghapuskan hutang Tan Sri Tajuddin Ramli, membayar pampasan yang lebih tinggi kepada Mirzan Mahathir dan lain-lain yang selama ini ditentang KEADILAN dan Pakatan Rakyat.

2. MOU yang ditandatangani tidak pun menjamin penstrukturan air dapat dijalankan di bawah kawalan Kerajaan Selangor seperti yang dimandatkan oleh KEADILAN dan Pakatan Rakyat kepada YAB Tan Sri Khalid Ibrahim.

---

[23] The Edge 25 Mei 2011, "PAAB to acquire water bonds"

[24] Ibid, kenyataan Tony Pua mengenai tindakan Kerajaan Persekutuan menyelamatkan syarikat pemegang konsesi

Umum mengetahui bahawa MOU itu adalah berat sebelah dan hanya mengikat di sisi undang-undang Kerajaan Selangor sedangkan komitmen Kerajaan Persekutuan tidak diikat.

Kerajaan Persekutuan berjaya mendapatkan kelulusan Kerajaan Selangor untuk meneruskan Projek Langat 2 dan memperolehi bayaran pampasan yang lumayan kepada Syabas dan Puncak Niaga.

Sebaliknya, selepas ditandatangani Kerajaan Selangor tersasar dari tempoh masa yang diumumkan YAB Tan Sri Khalid Ibrahim sendiri untuk menyempurnakan pengambilalihan semua pemegang konsesi kerana keengganan Kerajaan Persekutuan memenuhi komitmen yang dinyatakan secara longgar di dalam MOU untuk menggunakan kuasa Kerajaan Persekutuan di bawah akta untuk mengambilalih pemegang-pemegang konsesi yang enggan menerima tawaran.

Sehingga kini iaitu 5 bulan selepas MOU ditandatangani dan YAB Tan Sri Khalid Ibrahim muncul di kaca televisyen memberi gambaran beliau lebih selesa berurusan dengan Barisan Nasional untuk menyelesaikan masalah air rakyat berbanding Dato' Seri Anwar Ibrahim dan pimpinan KEADILAN yang mempersoalkan kandungan MOU, Kerajaan Persekutuan masih enggan menggunakan kuasanya mengambilalih pemegang konsesi yang menolak tawaran Kerajaan Selangor.

Ini bermakna, walaupun kelulusan Projek Langat 2 telah diberikan, status penstrukturan air yang diusahakan Kerajaan Selangor seperti yang dimandatkan oleh KEADILAN dan Pakatan Rakyat masih berada di takuk yang sama.

Pada 1 Ogos 2014, YAB Tan Sri Khalid Ibrahim sekali lagi membelakangkan pimpinan KEADILAN dan Pakatan Rakyat apabila beliau menandatangani pula perjanjian induk (*heads of agreement*) dengan Kerajaan Persekutuan untuk memperincikan lagi perjanjian-perjanjian berkenaan penstrukturan air yang dibuat di dalam MOU.

Rumusan terma-terma utama yang diedarkan oleh Raja Idris Kamaruddin (Pengerusi Kumpulan Darul Ehsan Berhad dan orang kanan YAB Tan Sri Khalid Ibrahim dalam rundingan penstrukturan air) kepada beberapa orang pimpinan KEADILAN, DAP dan PAS[25] pada 2 Ogos 2014 menunjukkan bahawa perjanjian yang ditandatangani itu masih belum mengikat Kerajaan Persekutuan untuk menggunakan kuasanya mengambilalih pemegang konsesi yang menolak tawaran Kerajaan Selangor.

Oleh itu, pimpinan KEADILAN percaya YAB Tan Sri Khalid Ibrahim perlu menjelaskan kenapa beliau secara berterusan menandatangani perjanjian dengan Kerajaan Persekutuan yang dilihat tidak pun menyelesaikan masalah air di Selangor tetapi memberi kelebihan kepada Kerajaan Persekutuan sahaja.

[25] Edaran dibuat dalam satu email yang dihantar kepada ahli-ahli satu jawatankuasa *public relations* yang baru ditubuhkan Tan Sri Khalid Ibrahim setelah dikritik kerana membelakangkan parti. Email itu menyenaraikan beberapa terma utama *heads of agreement* tetapi tidak menyertakan perjanjian yang sebenar

Sehingga sekarang YAB Tan Sri Khalid Ibrahim mengelak dari menjawab persoalan-persoalan pokok yang bersabit prinsip perjuangan KEADILAN dan Pakatan Rakyat ini. Lebih malang lagi apabila individu yang rapat dengan beliau seperti Puan Faekah Hussein dilihat menggunakan media sosial dan blogger anti Pakatan Rakyat seperti Raja Petra Kamaruddin[26] untuk menyerang kepimpinan KEADILAN dengan membuat tuduhan liar dan tidak berasas.

Tuduhan Dato' Seri Anwar Ibrahim, Saudara Rafizi Ramli dan KEADILAN Mengambil Komisen RM60 Juta dari SPLASH

Tuduhan yang paling sering diulang adalah kononnya KEADILAN melalui Dato' Seri Anwar Ibrahim dan Saudara Rafizi Ramli telah mengikat perjanjian sulit untuk mendapatkan komisen sebanyak RM60 juta dari Tan Sri Wan Azmi Wan Hamzah, salah seorang pemegang saham utama Splash.

Tuduhan ini dimainkan di dalam blog Raja Petra Kamaruddin dan kemudiannya dipetik oleh media milik Barisan Nasional.

Tidak pernah ada satu bukti pun yang dikemukakan oleh Raja Petra Kamaruddin melainkan tohmahan semata-mata. Tidak ada satu dokumen pun yang pernah ditampilkan oleh Raja Petra Kamaruddin.

Tuduhan ini dibawa untuk mengalihkan perhatian dari isu sebenar iaitu bagaimana pemenang terbesar dari penstrukturan air ialah Tan Sri Rozalli Ismail, kroni utama Umno yang akan mendapat pampasan keuntungan sebanyak RM1,638 juta. Tuduhan terhadap KEADILAN itu juga bertujuan untuk menutup satu fakta yang paling jelas iaitu YAB Tan Sri Khalid Ibrahim telah menaikkan nilai pampasan keuntungan sebanyak RM568 juta dari tawaran asal kepada Tan Sri Rozalli Ismail.

---

[26] Raja Petra Kamaruddin adalah abang kepada Raja Idris Kamaruddin iaitu orang kanan Tan Sri Khalid Ibrahim di Selangor. Tan Sri Khalid Ibrahim melantik Raja Idris Kamaruddin sebagai CEO Kumpulan Darul Ehsan Berhad (KDEB) iaitu syarikat induk pelaburan terbesar milik Kerajaan Selangor.

Banyak berita-berita yang cuba merosakkan imej KEADILAN berpunca dari blog Raja Petra Kamaruddin. Ada berita-berita ini yang hanya sulit diketahui oleh Tan Sri Khalid Ibrahim sahaja (dan mungkin dikongsikan dengan beberapa pegawai terdekat seperti Faekah Hussein) tetapi disiarkan serta merta dalam beberapa jam selepas berita itu disampaikan kepada Tan Sri Khalid Ibrahim.

Contoh yang terbaik adalah perjumpaan pada 26 Januari 2014 di antara Dato' Seri Anwar Ibrahim dan Tan Sri Khalid Ibrahim untuk memaklumkan *Kajang Move* dan keputusan parti memohon Tan Sri Khalid Ibrahim berundur. Perjumpaan berlangsung sehingga jam 12 tengahari dan hanya melibatkan Dato' Seri Anwar Ibrahim, Dato' Seri Dr Wan Azizah Wan Ismail dan Tan Sri Khalid Ibrahim.

Walau bagaimana pun, menjelang jam 4 petang hari itu berita mengenai perjumpaan itu telah pun disiarkan di blog Raja Petra.

Serangan yang berterusan ke atas pimpinan KEADILAN oleh Raja Petra di blognya menguatkan kepercayaan KEADILAN bahawa ada sumber yang rapat dengan Tan Sri Khalid Ibrahim yang terus mensabotaj parti dengan memberikan cerita yang tidak tepat untuk dijadikan modal serangan oleh Raja Petra.

Sudah tentu keputusan YAB Tan Sri Khalid Ibrahim itu yang dibuat pada akhir tahun 2013 dibantah oleh Splash kerana nilaian pampasan Splash dipotong mendadak sebanyak RM2 bilion sedangkan pampasan Tan Sri Rozalli Ismail dinaikkan RM568 juta.

Splash memohon untuk bertemu dengan YAB Tan Sri Khalid Ibrahim beberapa kali untuk membincangkan pertukaran nilaian mendadak ini di antara bulan Oktober 2013 hingga Disember 2013 tetapi tidak dilayan oleh YAB Tan Sri Khalid Ibrahim. Beliau menyatakan secara terbuka bahawa beliau tidak berniat untuk memberi ruang kepada Splash untuk membincangkan pertukaran nilaian yang diputuskan itu.

Perkara ini kemudiannya dibawa ke pengetahuan Dato' Seri Anwar Ibrahim dan KEADILAN.

Keengganan YAB Tan Sri Khalid Ibrahim untuk berjumpa dan menjelaskan kenapa beliau mengambil tindakan mengejut menukar dan memotong nilaian kepada Splash sehingga RM2 bilion dilihat sebagai tidak adil memandangkan YAB Tan Sri Khalid Ibrahim terus berurusan dan berjumpa dengan tokoh niagawan yang rapat dengan Barisan Nasional seperti Tan Sri Rozalli Ismail, Tan Sri Rashid Manaf dan Tan Sri Danny Tan.

Oleh yang demikian, di dalam beberapa mesyuarat (sama ada pertemuan khusus Dato' Seri Anwar Ibrahim dengan YAB Tan Sri Khalid Ibrahim atau di dalam mesyuarat Biro Politik) pimpinan KEADILAN menyatakan pendirian seperti berikut berhubung keengganan YAB Tan Sri Khalid Ibrahim bertemu dengan Splash untuk menerangkan rasional pemotongan nilaian:

1. Adalah tidak adil di pihak YAB Tan Sri Khalid Ibrahim menidakkan peluang mana-mana pemegang konsesi untuk duduk berbincang mengenai penstrukturan air di Selangor. Jika YAB Tan Sri Khalid Ibrahim selesa berbincang dan mencapai persetujuan dengan Syabas dan Puncak Niaga, beliau juga perlulah mengambil sikap yang sama kepada mana-mana pihak lain termasuklah Splash

2. Kerajaan Selangor perlu berhati-hati berurusan dengan Splash supaya ia (dan YAB Tan Sri Khalid Ibrahim) tidak dilihat berat sebelah dan prejudis terhadap Splash sebagai salah satu pemegang konsesi. Nilaian dan pampasan yang diputuskan perlulah boleh dipertahankan secara komersial dan adil berdasarkan aset, hutang dan prestasi syarikat supaya ia setara dengan prinsip yang digunapakai dalam menilai pampasan kepada pemegang konsesi lain seperti Syabas dan Puncak Niaga.

   Pimpinan KEADILAN juga berulang kali mengingatkan YAB Tan Sri Khalid Ibrahim bahawa jika nilaian dan pampasan terhadap Splash dilihat tidak adil berbanding pemegang konsesi lain seperti Syabas dan Puncak Niaga, Splash boleh mengambil tindakan menyaman Kerajaan Selangor di mahkamah.

   Jika nilaian itu apabila dibicarakan di mahkamah diputuskan tidak adil dan tidak seragam apabila dibandingkan dengan Syabas dan Puncak Niaga, mahkamah boleh mengarahkan Kerajaan Selangor membayar pampasan tambahan kepada Splash.

   Jika ini berlaku, rakyat Selangor juga yang akan menanggung kos yang lebih tinggi untuk mengambilalih industri air.

Oleh sebab itu, pimpinan KEADILAN menasihati adalah lebih baik sekiranya YAB Tan Sri Khalid Ibrahim memberi layanan sama rata kepada semua pemegang konsesi termasuklah Splash.

KEADILAN dan pimpinannya tidak pernah campur tangan dalam sebarang rundingan dengan Splash seperti yang didakwa oleh Raja Petra Kamaruddin selain dari dua pendirian yang dinyatakan di atas.

Kedua-dua arahan parti itu tidak dilayan oleh YAB Tan Sri Khalid Ibrahim sehingga kini.

Beliau juga tidak menghormati arahan Majlis Pimpinan Pakatan Rakyat yang mengarahkan secara khusus tidak ada sebarang perjanjian mengenai penstrukturan air yang boleh ditandatangani tanpa melibatkan semakan dan maklumbalas Panel Air Pakatan Rakyat yang dianggotai oleh Saudara Tony Pua (DAP), Saudara Rafizi Ramli (KEADILAN), Dr Dzulkifly Ahmad (PAS) dan Saudara Tommy Thomas (peguam bebas)[27]. YAB Tan Sri Khalid Ibrahim tidak pernah memberi salinan perjanjian-perjanjian sebelum ia ditandatangani bertentangan dengan arahan Majlis Pimpinan Pakatan Rakyat.

Justeru, apabila YAB Tan Sri Khalid Ibrahim sendiri membuat kenyataan media yang memberi gambaran seolah-olah Dato' Seri Anwar Ibrahim dan pimpinan KEADILAN cuba mempengaruhi rundingan penstrukturan air untuk mendapatkan habuan wang ringgit, ia adalah satu tindakan yang sangat dikesali oleh KEADILAN.

Tindakan itu bersifat tidak jujur, mengundang fitnah terhadap parti dan tidak menerangkan perkara yang sebenar. Ia satu permainan politik yang mengelirukan rakyat.

Sikap sebegini menguatkan lagi pendapat pimpinan KEADILAN yang merasakan YAB Tan Sri Khalid Ibrahim lebih mendepankan kedudukan beliau sebagai Menteri Besar dari keutuhan dan kesepakatan KEADILAN dan Pakatan Rakyat.

SOKONGAN YAB TAN SRI KHALID IBRAHIM UNTUK MELAKSANAKAN LEBUHRAYA KIDEX

Populariti YAB Tan Sri Khalid Ibrahim menjunam di kalangan pengundi bukan Melayu terutamanya di sekitar Petaling Jaya akibat keengganan beliau untuk memberi ruang kepada bantahan terhadap projek Lebuhraya Kinrara Damansara (KIDEX).

Setakat ini, bantahan terhadap KIDEX telah bertukar menjadi isu nasional yang boleh mengancam sokongan bukan Melayu di seluruh Malaysia kepada Pakatan Rakyat.

Penduduk-penduduk di Petaling Jaya yang terkesan dengan KIDEX membantah projek ini atas 3 alasan utama iaitu:

[27] Ibid, ketetapan mesyuarat Majlis Pimpinan Pakatan Rakyat bertarikh 6 Mac 2014 di Hotel Quality, Shah Alam. Ketetapan ini diumumkan keesokan harinya dalam satu kenyataan media

1. Projek ini tidak menguntungkan penduduk kerana hanya melalui kawasan mereka di Petaling Jaya. Malah, mereka mempersoalkan sama ada projek ini boleh menyelesaikan masalah trafik yang dialami

2. Projek bernilai RM2.2 bilion ini telah dianugerahkan oleh Kerajaan Persekutuan kepada dua buah syarikat yang dikawal oleh tokoh-tokoh yang rapat dengan Umno iaitu Datuk Hafarizam Harun (peguam Umno) dan Tun Zaki Azmi (bekas Ketua Hakim Negara melalui isteri beliau)[28]. Selain pembinaan lebuhraya itu, syarikat-syarikat ini akan diberi hak untuk mengutip tol selama 40 tahun.

   Sokongan YAB Tan Sri Khalid Ibrahim agar projek ini dilaksanakan dilihat bertentangan dengan dasar dan prinsip KEADILAN dan Pakatan Rakyat yang menentang penswastaan berat sebelah yang memberi keuntungan melampau kepada kroni

3. Lebuhraya bertol ini bertentangan dengan janji manifesto Pakatan Rakyat untuk menghapuskan tol secara berperingkat-peringkat. Sokongan YAB Tan Sri Khalid Ibrahim kepada projek lebuhraya yang akan mengenakan tol selama 40 tahun dilihat bertentangan dengan dasar dan prinsip KEADILAN dan Pakatan Rakyat

Malah, sokongan terbuka YAB Tan Sri Khalid Ibrahim yang enggan memberi ruang kepada pendapat yang menentang KIDEX juga bertentangan dengan arahan khusus yang dibuat oleh Dato' Seri Anwar Ibrahim mengenai pendekatan KEADILAN mengurangkan bebanan rakyat dengan menentang kenaikan tol[29].

Walaupun telah diberikan arahan berkali-kali dan dinasihati oleh pimpinan parti supaya memberi ruang kepada pandangan yang membantah KIDEX, YAB Tan Sri Khalid Ibrahim terus tidak menghiraukan arahan dan nasihat ini melalui pertembungan terbuka dengan kumpulan penduduk yang menentang KIDEX.

Ini dikhuatiri membawa kesan mendadak kepada tahap sokongan pengundi bukan Melayu di Selangor terhadap Pakatan Rakyat.

PRESTASI PENTADBIRAN KERAJAAN SELANGOR DI BAWAH KEPIMPINAN YAB TAN SRI KHALID IBRAHIM

Prestasi pentadbiran kerajaan Pakatan Rakyat di bawah kepimpinan YAB Tan Sri Khalid Ibrahim pada penggal pertama adalah baik dan memuaskan.

---

[28] The Malaysian Insider 21 Februari 2012, "Umno lawyer confirms highway award, says not a 'deal' for Perak"

[29] Kenyataan media Dato' Seri Anwar Ibrahim, "Keadilan akan tentang kenaikan tol melalui pegangan saham kerajaan selangor di dalam LDP, SPRINT dan KESAS"

Bersama-sama dengan semangat perubahan yang dijana oleh Pakatan Rakyat di peringkat pusat, pentadbiran yang baik di peringkat kerajaan Selangor menjadi kombinasi faktor yang membantu Pakatan Rakyat menang besar dalam PRU13 di Selangor.

Walau bagaimana pun, ada beberapa perkara berbangkit mengenai pentadbiran Selangor yang perlu diperbaiki demi mempertahankan kemenangan Pakatan Rakyat di Selangor. Lebih penting, prestasi dalam penggal pertama perlu dipertingkatkan agar boleh dijadikan batu loncatan untuk memenangi Putrajaya.

Strategi menjadikan Selangor sebagai negeri model pemerintahan Pakatan Rakyat adalah strategi utama KEADILAN yang akan membantu PAS dan DAP di negeri-negeri lain.

Oleh yang demikian, perbincangan berterusan dengan YAB Tan Sri Khalid Ibrahim mengenai prestasi pentadbiran Kerajaan Selangor berlaku dan menyentuh perkara-perkara ini:

1. Penyelesaian yang lebih lestari dan konsisten kepada prestasi kutipan sampah di Selangor.

   Masalah kebersihan dan prestasi kutipan sampah masih menjadi isu utama di Selangor yang perlu diselesaikan segera. Walaupun tindakan YAB Tan Sri Khalid Ibrahim memotong orang tengah dan berurusan terus dengan kontraktor untuk menjimatkan belanja dipuji, ia perlulah disertai dengan prestasi kutipan sampah yang memuaskan hati penduduk.

   Kajiselidik Penilaian Asas Untuk Menambahbaik Prestasi PBT Selangor[30] menunjukkan bahawa masalah pengurusan sampah adalah isu ketiga terpenting yang disenaraikan oleh responden apabila ditanya masalah setempat yang perlu diberi perhatian segera oleh Kerajaan Negeri.

   Apabila ditanya apakah tindakan segera yang boleh diambil Kerajaan Negeri yang boleh meningkatkan kualiti hidup penduduk, responden menamakan pengurusan sampah sebagai tindakan yang paling penting.

   Kajiselidik itu yang dibuat oleh Kerajaan Selangor sendiri mengesahkan bahawa prestasi kutipan sampah di Selangor perlu ditangani secepat mungkin dan diperbaiki.

   Masalah ini telah berlarutan beberapa tahun dan kelambatan memperbaiki prestasi kutipan sampah menjejaskan imej kecemerlangan pentadbiran Pakatan Rakyat

2. Satu lagi aduan utama yang menjejaskan imej kecemerlangan pentadbiran Pakatan Rakyat ialah aduan jalan berlubang yang sering didengari.

   Masalah ini turut disahkan oleh Kajiselidik Penilaian Asas Untuk Menambahbaik Prestasi PBT Selangor sebagai salah satu masalah teratas yang perlu diperbaiki oleh Kerajaan Selangor.

[30] Kajiselidik oleh firma kajiselidik bebas untuk Kerajaan Selangor melibatkan 6,436 responden di seluruh Selangor. Kajiselidik dibuat di antara 16 Mei 2014 hingga 6 Julai 2014, menjadikannya ia antara kajiselidik yang terkini mengenai prestasi Kerajaan Selangor

Responden menamakan masalah infrastruktur awam sebagai masalah terpenting (di tangga teratas) yang perlu diberi perhatian segera oleh Kerajaan Selangor. Apabila ditanya tentang isu-isu yang perlu diselesaikan segera yang boleh meningkatkan kualiti hidup rakyat, responden menamakan "kemudahan awam" (di tempat kedua) dan "jalan berlubang" (di tempat keempat).

Pimpinan KEADILAN sebelum ini pernah beberapa kali memberi arahan dan menasihati YAB Tan Sri Khalid Ibrahim supaya membelanjakan sepenuhnya geran persekutuan yang diberikan setiap tahun untuk membaiki jalan.

Prestasi YAB Tan Sri Khalid Ibrahim dalam membelanjakan geran persekutuan untuk membaiki jalan sering menjadi titik perbincangan di peringkat KEADILAN kerana peratusan geran yang dibelanjakan adalah rendah iaitu hanya 69.3% dibelanjakan dalam tahun 2010, 59.3% dibelanjakan dalam tahun 2011 dan menurun kepada 42.7% dibelanjakan dalam tahun 2012.

YAB Tan Sri Khalid Ibrahim mempunyai kecenderongan untuk menyimpan geran tersebut sebagai hasil terkumpul Kerajaan Selangor dan tidak dibelanjakan sehingga mempunyai kesan kepada kualiti jalan di Selangor.

Di antara tahun 2010 hingga 2012, hanya RM640.24 juta dibelanjakan seperti yang sepatutnya untuk membaiki jalan sedangkan baki RM499.76 juta disimpan sebagai wang terkumpul[31].

Pimpinan KEADILAN menyatakan secara tegas bahawa adalah tidak adil menyimpan wang ini dengan harapan menunjukkan prestasi pengurusan kewangan yang baik melalui simpanan rizab RM3 bilion sedang sebahagian dari dana ini sepatutnya dihabiskan setiap tahun untuk membaiki jalan di seluruh Selangor.

Arahan dan nasihat pimpinan KEADILAN tidak diendahkan sehinggakan YAB Tan Sri Khalid Ibrahim dikritik di dalam laporan Ketua Audit Negara 2012 kerana tidak membelanjakan geran penjagaan jalan yang diberikan Kerajaan Persekutuan.

Oleh kerana prestasi Kerajaan Selangor tidak meningkat dalam perkara ini, Dato' Seri Anwar Ibrahim mula membuat kenyataan terbuka menegur YAB Tan Sri Khalid Ibrahim supaya membelanjakan geran dan dana untuk projek-projek yang menguntungkan rakyat.

3. Keputusan YAB Tan Sri Khalid Ibrahim menaikkan lesen perniagaan di Selangor sehingga 3 kali ganda di saat rakyat sudah berdepan dengan tekanan kenaikan harga yang lain dilihat bertentangan dengan dasar dan pendirian KEADILAN dan Pakatan Rakyat.

   Tindakan itu menimbulkan tanda tanya kerana kenaikan kadar lesen itu diluluskan oleh pentadbiran Barisan Nasional di bawah Dato' Seri Khir Toyo. Pimpinan KEADILAN tidak melihat rasional kenapa perlu diberi ruang agar KEADILAN dan Pakatan Rakyat

[31] Laporan Ketua Audit Negara 2012

diserang dengan melaksanakan dasar tidak popular dan menekan rakyat yang diluluskan oleh Barisan Nasional sebelum ini.

KESIMPULAN

KEADILAN percaya bahawa sebuah pentadbiran itu adalah hasil muafakat satu pasukan dan tidak boleh bergantung kepada seorang sahaja tidak kiralah bagaimana pintar dan handal seorang pemimpin itu.

Kehandalan dan kecekapan seorang pemimpin sebagai pentadbir juga tidaklah boleh mengenepikan soal prinsip dasar, integriti, kejujuran, hormat kepada keputusan bersama dan kebertanggungjawaban.

Mengambil kira semua bukti dan fakta yang dihuraikan di sini yang menyentuh terutamanya soal integriti, KEADILAN berpendapat ada keraguan munasabah yang tidak berjaya dijawab oleh YAB Tan Sri Khalid Ibrahim.

Berdasarkan semua pertimbangan yang dihuraikan di dalam laporan ini dan perkara-perkara lain, KEADILAN membuat keputusan untuk mengangkat kepimpinan pentadbiran baru dengan Dato' Seri Dr Wan Azizah Ismail sebagai Menteri Besar yang baru.

LAPORAN DISEDIAKAN

IBU PEJABAT KEADILAN
3 OGOS 2014

A

Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D4–22A-216 OF 2007
B MOHD ZAWAWI J
2 DECEMBER 2011

C *Banking — Banks and banking business — Islamic banking — Islamic banking concept of al-Bai Bithaman Ajil — Bank applied for reference of Shariah issues to Shariah Advisory Council of Bank Negara Malaysia — Shariah issues had been raised — Whether ss 56 and 57 of the Central Bank of Malaysia Act 2009 could be applied retrospectively — Whether ss 56 and 57 of the Act contravened the Federal Constitution — Whether application should be allowed — Central Bank of*
D *Malaysia Act 2009 ss 56 & 57*

The Bank Islam Malaysia Bhd ('the bank') had granted Tan Sri Abdul Khalid bin Ibrahim ('the plaintiff') a revolving al-Bai Bithaman Ajil agreement ('the BBA facility'), an Islamic financing facility. In order to achieve the objective of
E this facility the parties had intended to bind themselves by the Shariah principles of al-Bai Bithaman Ajil. Pursuant to the terms of the BBA facility, the plaintiff had executed seven sets of asset purchase agreements and asset sale agreements ('the BBA facility agreements') at six monthly intervals. The plaintiff was dissatisfied with the conduct of the bank in connection with the
F BBA facility, which he alleged contravened the religion of Islam. The plaintiff thus commenced a suit against the bank ('the plaintiff's suit') and sought, inter alia, a declaration that the BBA agreements entered into by both parties were null and void. The bank denied the plaintiff's allegations and pleaded that under civil law and Shariah principles, parties were bound by their agreements
G and thus the plaintiff was bound by the clear terms of the BBA facility agreements. Subsequently, the bank commenced a debt recovery action ('the defendant's suit') against the plaintiff alleging that the plaintiff had defaulted the terms of the BBA facility. Prior to the consolidation of the two suits (the plaintiff's suit and the bank's suit), the bank applied for summary judgment in
H respect of its suit, which the plaintiff resisted. The High Court allowed the summary judgment application but the plaintiff appealed to the Court of Appeal, which allowed the appeal. During case management of this consolidated action the bank filed the present application pursuant to s 56 of the Central Bank of Malaysia Act 2009 ('the Act') to refer certain questions to
I the Shariah Advisory Council of Bank Negara Malaysia ('SAC'). The bank submitted that the plaintiff had raised Shariah issues and that under s 56 of the Act such issues should be referred to the SAC, whose ruling would be binding on this court by virtue of s 57 of the Act. The plaintiff objected to this application, inter alia, on the grounds that there had been a prior reference to

the SAC at the summary judgment stage; that ss 56 and 57 of the Act did not operate retrospectively; that ss 56 and 57 of the Act contravened the Federal Constitution; and that the Shariah issues were not appropriate for reference to the SAC.

Held, allowing the application with costs in the cause:

(1) This court found that, based on the allegations raised by the plaintiff and the defence advanced by the bank, there were Shariah issues to be decided by this court. Based on the facts of this case it was found that there were Shariah issues for the ascertainment of the SAC, namely, whether the BBA facility agreements executed by the parties were contrary to the principles of Shariah; whether the bank was allowed to dispose of the shares pledged by the plaintiff as security under the agreements without his permission; whether the plaintiff's obligation to settle his indebtedness with the bank would be extinguished if the BBA facility agreements were found to be contrary to the principles of Shariah; whether there must be two distinct and separate contracts between the first and the second sale and if so whether there had been a violation in the present case; Whether the shares pledged with the bank which were already sold could be repurchased and resold. Both parties had also intended to bind themselves by the Shariah principles at the time the agreements were executed (see paras 15–23).

(2) The plaintiff's contention that there had been a prior reference to the SAC at the summary judgment stage could not stand. The summary judgment had been overruled and the trial of the matter was still open. Thus, this court was at liberty to refer the Shariah issue to the SAC (see paras 27 & 29).

(3) It was the plaintiff's argument that the execution of the BBA facility and the consolidation of the suits were effected before the Act came into force on 25 November 2009 and therefore ss 56 and 57 of the Act could not be applied retrospectively. However, there is a presumption that amendments to purely procedural statutes should be given retrospective effect and amendments that change substantial rights be given prospective rights. In any case, there would be no adverse effect to the plaintiff's existing substantive rights by the application of a new procedure as far as Shariah issues were concerned. The only difference would be that as from 25 November 2009, the discretionary power of the court to take into consideration any written directive issued by BNM had been taken away and the ruling of the SAC was binding on the court. In any case the plaintiff's argument that he had a vested right to lead expert evidence was untenable because the SAC is a statute-appointed expert (see paras 30, 40, 43–44).

(4) It is settled law that ss 56 and 57 of the Act are valid federal laws enacted

A by Parliament and as such were not in contravention of the FC. Difference of opinion on Shariah issues relating to Islamic banking should be resolved within the SAC. It is advisable and practical that a special body like the SAC should ascertain the Islamic law most applicable to the Islamic banking industry in Malaysia (see paras 45 & 57).

B

[Bahasa Malaysia summary

Bank Islam Malaysia Bhd ('bank tersebut') telah memberikan Tan Sri Abdul C Khalid bin Ibrahim ('plaintif') satu perjanjian pusingan al-Bai Bithaman Ajil ('kemudahan BBA tersebut'), satu kemudahan kewangan secara Islam. Bagi tujuan mencapai objektif kemudahan tersebut pihak-pihak telah berniat untuk mengikat diri mereka dengan prinsip-prinsip Syariah al-Bai Bithaman Ajil. Menurut terma-terma kemudahan BBA tersebut, plaintif telah melaksanakan D tujuh set perjanjian beliau aset dan perjanjian jualan aset (perjanjian-perjanjian kemudahan BBA') pada enam bulan. Plaintif tidak berasa puas hati dengan perbuatan bank berkaitan kemudahan BBA tersebut, yang dikatakannya bertentangan dengan agama Islam. Plaintif dengan itu telah memulakan guaman terhadap bank tersebut ('guaman plaintif tersebut') dan memohon, E antara lain, satu deklarasi bahawa perjanjian-perjanjian BBA tersebut yang dimasuki oleh kedua-dua pihak adalah terbatal dan tidak sah. Bank tersebut telah menafikan dakwaan plaintif dan memplid bahawa di bawah undang-undang sivil dan prinsip-prinsip Syariah, pihak-pihak terikat oleh F perjanjian-perjanjian mereka dan oleh itu plaintif terikat oleh terma-terma jelas perjanjian-perjanjian kemudahan BBA tersebut. Berikutan itu, bank tersebut telah memulakan tindakan mendapat balik hutang ('guaman defendan') terhadap plaintif dengan mengatakan bahawa plaintif telah gagal mematuhi terma-terma kemudahan BBA tersebut. Sebelum gabungan dua G guaman tersebut ('guaman plaintif dan guaman bank tersebut), bank telah memohon penghakiman terus berkaitan guamannya, di mana plaitif telah menolak. Mahkamah Tinggi telah membenarkan permohonan penghakiman terus itu tetapi plaintif telah merayu ke Mahkmah Rayuan, yang telah membenarkan rayuan tersebut. Sewaktu pengurusan kes untuk gabungan H tindakan ini bank tersebut telah memfailkan permohonan ini menurut s 56 Akta Bank Negara Malaysia 2009 ('Akta tersebut') untuk merujuk persoalan-persoalan tertentu kepada Majlis Penasihat Syariah Bank Negara Malaysia ('MPS'). Bank tersebut telah berhujah bahawa plaintif telah menimbulkan isu-isu Syariah dan bahawa di bawah s 56 Akta tersebut isu-isu I sedemikian hendaklah dirujuk kepada MPS, yang mana keputusannya adalah mengikat ke atas mahkamah ini menurut s 57 Akta tersebut. Plaintif membantah permohonan ini, antara lain, atas alas an bahawa terdapat rujukan terdahulu kepada MPS di peringkat penghakiman terus; bahawa ss 56 dan 57 Akta tersebut tidak beroperasi secara retrospektif; bahawa ss 56 and 57 Akta

tersebut bertentangan dengan Perlembagaan Persekutuan; dan bahawa isu-isu Syariah tersebut tidak sesuai untuk dirujuk ke MPS. A

Diputuskan, membenarkan permohonan dengan kos dalam kausa:

(1) Mahkamah ini mendapati bahawa, berdasarkan dakwaan yang ditimbulkan oleh plaintif dan pembelaan yang dikemukakan oleh bank tersebut, terdapat isu-isu Syariah yang perlu ditentukan oleh mahkamah ini. Berdasarkan fakta kes ini adalah didapati bahawa terdapat isu-isu Syariah untuk penentuan MPS, iaitu, sama ada perjanjian-perjanjian kemudahan BBA tersebut yang dimasuki oleh pihak-pihak tersebut bertentangan dengan prinsip-prinsip Syariah; sama ada bank tersebut dibenarkan menjual saham-saham yang dicagar oleh plaintif sebagai jaminan di bawah perjanjian-perjanjian tersebut tanpa kebenarannya; sama ada obligasi plaintif untuk melangsaikan keberhutangannya dengan bank tersebut adakan dilupuskan jika perjanjian-perjanjian kemudahan BBA tersebut didapati bertentangan dengan prinsip-prinsip Syariah; sama ada perlu ada dua kontrak yang berbeza dan berasingan antara jualan pertama dan kedua dan jika sedemikian sama ada terdapat pelanggaran dalam kes ini; sama ada saham-saham yang dicagarkan dengan bank tersebut yang telahpun dijual boleh dibeli semula dan di jual semula. Kedua-dua pihak juga berniat untuk mengikat diri mereka dengan prinsip-prinsip Syariah pada masa perjanjian-perjanjian tersebut dimasuki (lihat perenggan 15–23). B C D E

(2) Hujah plaintif bahawa terdapat rujukan terdahulu ke MPS di peringkat penghakiman terus tidak dapat dikekalkan. Penghakiman terus itu telahpun ditolak dan perbicaraan perkara itu masik terbuka. Oleh itu, mahkamah ini bebas merujuk isu Syariah itu kepada MPS (lihat perenggan 27 & 29). F

(3) Adalah hujah plaintif bahawa pelaksanaan kemudahan BBA tersebut dan gabungan guaman-guaman tersebut berkuat kuasa sebelum Akta tersebut berkuat kuasa pada 25 November 2009 dan oleh itu ss 56 dan 57 Akta tersebut tidak boleh terpakai secara retrospektif. Walau bagaimanapun, terdapat anggapan bahawa pindaan-pindaan kepada statut-statut yang hanya berbentuk prosedur patut diberikan kesan retrospektif dan pindaan-pindaan yang mengubah hak-hak substantif patut diberikan hak-hak yang prospektif. Dalam apa-apa keadaan, tidak terdapat kesan bertentangan terhadap hak-hak substantif sedia ada plaintif dengan permohonan prosedur baru setakat mana isu-isu Syariah adalah berkaitan. Perbezaannya hanyalah bahawa bermula 25 November 2009, kuasa budi bicara mahkamah untuk mengambilkira pertimbangan apa-apa arahan bertulis oleh BNM telah diambil dan keputusan MPS adalah mengikat ke atas mahkamah. Dalam apa-apa keadaan hujah plaintif bahawa dia telah diberikan hak untuk mengemukakan G H I

A keterangan pakar tidak dapat dipertahankan kerana MPS adalah pakar yang dilantik melalui statut (lihat perenggan 30, 40, 43–44).

(4) Adalah undang-undang tetap bahawa ss 56 dan 57 Akta tersebut merupakan undang-undang persekutuan yang digubal oleh Parlimen dan oleh itu tidak bertentangan dengan Perlembagaan Persekutuan. Perbezaan pendapat berhubung isu-isu Syariah berkaitan perbankan Islam hendaklah diselesaikan dalam MPS. Adalah dinasihatkan dan praktikal bahawa badan khas seperti MPS patut menentukan undang-undang Islam yang paling sesuai untuk industri perbankan Islam di Malaysia (lihat perenggan 45 & 57).]

Notes

For cases on Islamic banking, see 1(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2273–2290.

Cases referred to

Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor [2009] 6 MLJ 839, CA (refd)
Bank Shamil of Bahrain v Beximco Phamaceutical Ltd & others [2004] All ER (D) 280, CA (refd)
CIMB Islamic Bank Bhd v LCL Corporation Bhd & Anor [2011] 7 CLJ 594, HC (refd)
Curtis v Johannesburg Municipality 1906 TS 308, CA (refd)
Goopan s/o Govindasamy v A Subramaniam & Anor [1980] 2 MLJ 64, FC (refd)
Howard Smith Paper Mill Ltd et al v The Queen [1957] SCR 403, SC (refd)
L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamhip Co Ltd, The Boucraa [1994] 1 AC 486, HL (refd)
Lee Chow Meng v PP [1978] 2 MLJ 36, FC (refd)
Lim Phin Khian v Kho Su Ming [1996] 1 MLJ 1, FC (refd)
Maxwell v Murphy [1957] HCA 7; (1957) 96 CLR 261 (refd)
Newell, The v King [1936] HCA 50; (1936) 55 CLR 707 (refd)
Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd and another suit [2011] 3 MLJ 766, HC (refd)
Tribunal Tuntutan Pembeli Rumah v Westcourt Corp Sdn Bhd and other appeals [2004] 3 MLJ 17; [2004] 2 CLJ 617, CA (refd)
Yew Bon Tew v Kenderaan Bas Mara [1983] 1 AC 553, PC (refd)

Legislation referred to

Central Bank of Malaysia Act 1958 (Repealed by Central Bank of Malaysia Act 2009) s 16B(8)
Central Bank of Malaysia Act 2009 ss 56, 56(1)(b), 57
Federal Constitution arts 8, 74, Ninth Schedule, List I, item 4(k)

Malik Imtiaz (Mathew Philips, Asma Mohd Yunus, Azinuddin Karim and Janine Gill with him) (Thomas Philip) for the plaintiff.

Alan Adrian Gomez (Ganesan Nethi with him) (Tommy Thomas) for the defendant.

Mohd Zawawi J:

INTRODUCTION

[1] This is my judgment in respect of the defendant's application ('encl 59') pursuant to s 56 of the Central Bank of Malaysia Act 2009 ('Act 701') to refer certain questions to the Shariah Advisory Council of Bank Negara Malaysia ('SAC').

[2] I have heard learned counsel for the parties, perused the application and other relevant documents and considered the written submissions filed herein. I made an order allowing the reference and fixed 1 December 2011 for the parties to appear before the court to assist the court in formulating the questions to be referred to SAC. By agreement of the parties, the court decided to refer the following questions to SAC:

(a) whether, pursuant to the terms of the BBA facility agreements, the mode of execution of asset sale agreements and purchase agreements by the defendant ('Bank Islam') and the plaintiff ('Tan Sri Khalid') at six monthly intervals, is contrary to the principles of Shariah;

(b) whether it is a requirement under Shariah law for Bank Islam, after having declared a default of the terms of the BBA facility agreements to obtain Khalid's consent prior to the disposal of the shares pledged by him as security under the said agreements;

(c) in the event that BBA facility agreements are found to be contrary to the principles of Shariah, what would be obligations of the parties?;

(d)

(i) whether it is the opinion of the Shafie Madzhab that there must be two district and separate contracts/transactions between the first and the second sale in *bai-inah* transactions;

(ii) if so, whether in light of the, inter alia, para D and E of the recital and article 2.3.1, 2.3.2 and 3.1(a) of the master revolving al-Bai Bithaman Ajil agreement dated 30 April 2001 ('BBA facility') and/or the fact that the BBA facility is a restructuring of earlier *Murabahah* agreements, whether the qualification referred has been violated?; and

(e) Whether, in the circumstances of this case, the revolving element of BBA facility is tantamount to multiple contracts on the same subject matter ie the Kumpulan Guthrie shares, and it so, whether is contrary to the Shariah principles and the BNM SAC Resolution No 131.

A ('Shariah issues')

[3] For clarity and convenience sake, I will refer the plaintiff as Tan Sri Khalid and the defendant as Bank Islam.

B BACKGROUND FACTS

[4] Compendiously and concisely, the relevant facts necessary and germane to the disposal of this application run as under:

C

(a) Suit 22A-216 of 2007 ('Suit 216') was filed by Tan Sri Khalid on 18 May 2007. The essence of the complaint by Tan Sri Khalid is that Bank Islam had acted in defiance of a collateral contract between the parties in having terminated the Bai Bithaman Ajil facility entered between them on 30 April 2001 ('the BBA facility');

D

(b) Suit 22A-227 of 2007 ('Suit 227') was filed by Bank Islam on 24 May 2007. It is in essence a debt recovery action premised upon the BBA facility;

E

(c) the two suits were consolidated on 15 May 2008;

(d) Bank Islam applied for summary judgment in respect of Suit 227 on 17 July 2007 ('the summary judgment application'). In resisting the application, Tan Sri Khalid, inter alia, challenged the validity of the BBA facility agreements and the legality of the sale of the pledged shares by Bank Islam, inter alia, for want of compliance with religion of Islam and/or the principles of Shariah. The same were also pleaded in his statement of defence;

F

G

(e) my learned sister, Rohana Yusuf J, on 21 August 2009, had allowed the summary judgment application; (see *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd and another suit* [2011] 3 MLJ 766);

(f) Tan Sri Khalid appealed the decision to the Court of Appeal vide Civil Appeal W-02(IM)-1828 of 2009. In allowing the appeal on 3 March 2009, the Court of Appeal stated in its brief grounds that in view of the conflict of views of the experts, the matter ought to proceed to full blown trial;

H

I

(g) the trial of this action had been proceeded with two witnesses until on 1 January 2010, where my learned sister Rohana Yusuf J, was recused by an order of the Court of Appeal; and

(h) this action was then case managed before my learned sister, Has Zanah bt Mehat J and subsequently myself until to date. Further trial dates were

fixed but on 13 June 2011, Bank Islam filed encl 59.

GROUNDS OF ENCL 59

[5] The grounds of the application, as set out in the affidavit affirmed by Ganesan a/l Nethiganantarajah on 13 June 2011, were in substance twofold: first, that there were Shariah issues put forth by Tan Sri Khalid to be decided by this court and, second, s 56 of the Act 701 imposes such issues to be referred to SAC in which any ruling made shall be binding on this court by virtue of s 57 of the Act 701.

GROUNDS OF OBJECTION

[6] In response, Tan Sri Khalid objected to encl 59 on the grounds that: (i) there had been a prior reference to SAC by my learned friend, Rohana Yusuf J, at the summary judgment stage; (ii) s 56 and s 57 of Act 701 relied by Bank Islam do not operate retrospectively; (iii) s 56 and s 57 of the Act 701 contravene the Federal Constitution, in particular Part IX, art 74 and art 8; (iv) the Shariah issues are not appropriate for reference to and/or determination by SAC; (v) there is a potential conflict of interest on the part of SAC by reason of SAC is a body supervised and regulated by Bank Negara Malaysia ('BNM') and BNM has been involved in many material aspect concerning the transaction between Tan Sri Khalid and Bank Islam; and (vi) parties are entitled to tender expert evidence on matters of Islamic law.

ISSUES

[7] In view of the above, the main issues to be decided by this court may be summarised as follows:

(a) whether there is any question arises before this court concerning a Shariah matter ('Shariah issue');

(b) if the answer to 7(a) is in the affirmative, whether this court is estopped and/or functus officio from making any reference to SAC when the question was duly referred by my learned sister, Rohana Yusuf J ('estoppel issue');

(c) if the answer to 7(b) is in the negative, whether this court should refer the Shariah issues pursuant to s 56 of the Act 701 or s 16B(8) of the repealed Central Bank Act 1958 ('the repealed CBA') ('applicable law'); and

(d) whether s 56 and s 57 of Act 701 contravene the Federal Constitution ('Constitutionality of s 56 and s 57 of the Act 701').

A

FINDINGS OF THE COURT

Shariah issue

B

[8] In this instant case, it was not in dispute that this consolidated actions arise from the BBA facility, an Islamic financing facility, which was granted to Tan Sri Khalid by virtue of the master revolving al-Bai Bithaman Ajil facility agreement dated 30 April 2011 ('the master BBA facility agreement').

C

[9] In order to achieve the objective of the facility as set out in Item 3 of Schedule 1 of the master BBA facility agreement, the parties have intended to bind themselves by the Shariah principles of al-Bai Bithaman Ajil. This has been expounded in several provisions in the master BBA agreement such as the followings:

D

(i) Clause D

> In accordance with the Bank's procedures under the Syariah principle of Al-Bai Bithaman Ajil, the Customer agrees to sell to the Bank and the Bank agrees to purchase from the Customer the Asset at the times hereinafter stated and upon the terms and subject to the conditions hereinafter contained for the purpose of the Bank immediately thereafter selling the Asset to the Customer upon deferred payment terms;

E

F

(ii) Clause E

> Further and pursuant to the principle of Al-Bai Bithaman Ajil, the Bank agrees to sell to the Customer and the Customer agrees to purchase from the Bank the Asset, at the times hereinafter stated, on deferred payment terms and upon the terms and subject to the conditions hereinafter contained;

G

(iii) Clause 9.21

> It is hereby agreed and declared that the transactions in respect of the Asset as provided herein are not in any manner whatsoever intended to contravene any applicable companies legislations or regulations particularly those in respect of restrictions on the transfer of shares, but are entered into solely for the purpose of complying with the Syariah principle of Al-Bai Bithaman Ajil.

H

I

[10] It was pleaded by Tan Sri Khalid that, inter alia, he was dissatisfied with the conduct of Bank Islam in connection with the BBA facility which he believes tantamount to contravention to the religion of Islam and by way of this action, Tan Sri Khalid is now seeking, inter alia, a declaration that the BBA agreements entered into by both parties were null and void.

[11] According to him, the transaction contemplated under the BBA facility was not one that could be considered to be a 'true al-Bai Bithaman Ajil transaction'. It was instead, a simple loan agreement. Thus, the profit element was in fact an interest element which was not approved by the religion of Islam.

[12] The BBA facility executed between Tan Sri Khalid and Bank Islam was based on Shariah contract of *bai al-inah*. Scholars gave different definitions to *bai al-inah* contract due to their different opinions regarding its forms. The most famous definition given to it by classical scholars was: 'A situation whereby a person sells a commodity to another for a specific price with payment delayed until a fixed date, and then buys back from him at a lower price by cash'. However, *Al Mawsu'ah Al-Fiqhiyyah* (The Juristic Encyclopedia) defines it on the basis of the essence of engaging in it: that it is 'a loan in the form of a sale in order to make the increase appear lawful' (see *Islamic Financial System-Principles & Operations, ISRA*, at p 221).

[13] The application of *bai' al-inah* is still regarded as a matter of juristic disagreement amongst the Shariah scholars. Some countries would espouse the views taken by the denouncers' of inah and the others preferably adopted the proponents' view on inah [see the discussion on bai al-inah in *CIMB Islamic Bank Bhd v LCL Corporation Bhd & Anor* [2011] 7 CLJ 594].

[14] Bank Islam, on the other hand, denied such allegations and pleaded, inter alia, that under civil law and Shariah principles, parties are bound by their agreements (*aufu bit uqud*) and Tan Sri Khalid is bound by the clear terms of the BBA facility agreements he had duly executed.

[15] Looking at the above arguments, to my mind, there is no doubt that the allegations put forward by Tan Sri Khalid and the defence advanced by Bank Islam speak for themselves that there were Shariah issues to be decided by this court.

[16] Concerning question (i), there was evidence to show that Tan Sri Khalid had executed seven sets of asset purchase agreements ('APA') and asset sale agreements ('ASA') at six monthly intervals:

(a) APA and ASA both dated 30 April 2001;

(b) APA and ASA both dated 31 December 2001;

(c) APA and ASA both dated 1 July 2002;

(d) APA and ASA both dated 1 January 2003;

(e) APA and ASA both dated 30 June 2003;

(f) APA and ASA both dated 30 December 2003; and

A (g) APA and ASA both dated 30 June 2004.

[17] Based on the above facts, the Shariah issue for ascertainment of SAC is whether the transaction had been executed according to the religion of Islam and the conditions stipulated by Bank Negara Malaysia (Bank Negara Malaysia B Shariah Advisory Council Resolution No BNM/RH/CIR 007–19) ('the BNM circular') in particular. The relevant conditions to the issue are as follows:

(a) BBA contract which is based on *bai al-inah* contract shall consist of two clear and separate sale and purchase contract which are purchase contract C and sale contract; and

(b) the first sale and purchase contract shall be executed first before the second sale contract is executed. The purpose is to avoid the issue of selling an asset which is yet to be owned.

D

[18] Concerning question (ii), Bank Islam alleged that Tan Sri Khalid had defaulted the terms of the BBA facility agreements. The Shariah issue for ascertainment by SAC is simply this: whether Bank Islam is allowed to dispose off the shares pledged by Tan Sri Khalid as security under the said agreements E without his permission.

[19] Concerning question (iii), the Shariah issue for ascertainment by SAC is that in the event the BBA facility agreements are found to be contrary to the principles of Shariah, would Tan Sri Khalid's obligation to settle his F indebtedness, if any, to Bank Islam be extinguished.

[20] Concerning question (iv), the court would like SAC to confirm whether it is the opinion of the Shafie Mazhab that there must be two distinct and separate contracts/transactions between the first and the second sale in *bai* G *al-inah* transactions and if so, whether such opinion has been violated in this circumstances of the case. As the court understands it, based on the Shariah principles, all transactions/agreements in Islamic facilities shall be treated as district, separate and independent contracts/transactions between the first and the second sales.

H

[21] Concerning question (v), it was alleged by Tan Sri Khalid that the revolving BBA as executed by him and Bank Islam seems to be a multiple contracts on same subject matter of sale and purchase which was the Kumpulan Guthrie Bhd shares. It is trite that based on Shariah principles of Islamic law of I contract, the original BBA (not Revolving BBA) itself shall be treated as a valid, enforceable and independent contract and it is a binding contract between parties. So, the Shariah issue for ascertainment by SAC is this: whether in the circumstances of this case, the Kumpulan Guthrie Bhd shares which was already sold, could be purchased back and resold again.

[22] I am satisfied that the parties are truly concerned about the principles of Shariah on which the agreements are founded. The parties had intended to bind themselves by the Shariah principles at the time the agreements were executed by expounding several provisions to the effect in the master BBA facility agreement as referred to earlier.

[23] Looking at the purpose of s 56 of the Act 707, it is clear that SAC is required to ascertain the applicable Islamic law to the above Shariah issues. Upon ascertainment of the Islamic law, the court would then apply it to the facts of the present case. This approach is in conconance with the decision in *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor* [2009] 6 MLJ 839, where Raus Sharif JCA (as he then was) stated:

> In this respect, it is our view that judges in civil courts should not take upon themselves to declare whether a matter is in accordance to the Religion of Islam or otherwise …

Estoppel issue

[24] This is an interesting issue because this case has been presided by two judges: my learned sister Rohana Yusuf J and myself.

[25] In the course of oral clarification of the written submissions for the summary judgment application, Rohana Yusuf J, on 24 April 2009, had through the deputy registrar, referred the matter set out below to SAC pursuant to s 16B(8) of the Repealed CBA when the issue and/or defence of illegality has been set up by Tan Sri Khalid:

> Saya diarahkan oleh Yang Arif Hakim Mahkamah Tinggi Dagang 4 Kuala Lumpur yang sedang mengendalikan satu kes melibatkan pertikaian mengenai kesahihan kontrak Bai Bithaman Aiil di bawah perbankan Islam.
>
> 2. Berikutan dengan itu saya diarahkan untuk merujuk kepada Majlis Penasihat Syariah Bank Negara Malaysia di bawah s 16B(8) Akta Bank Negara Malaysia 1958 (Pindaan 1994) *samada terdapat resolusi yang diluluskan oleh Majlis tersebut berkenaan kontrak Bai Bithaman Ajil.*(Emphasis added.)

[26] SAC replied on 27 April 2009 and under cover of its reply forwarded a copy of the BNM circular.

[27] It was Tan Sri Khalid's stand that this court had duly exercised its discretion to refer the Shariah issue on the alleged illegality to SAC as it had at the time. Therefore, this application should not be allowed for the second opinion.

A **[28]** With respect, I am not inclined to agree with this argument. Bare reading and looking at exh AKI1 in totality make it clear that as far as the reference letter undersigned by learned deputy registrar dated 24 April 2009 is concerned, the same was not a reference to SAC for a new ruling on Shariah issue. The letter did not address any specific issue to be decided by SAC.

B

[29] In my considered view, what the letter intended for was to inquire if there was any existing resolution passed by SAC in respect of BBA contract. The BNM circular was not issued because of the dispute between the parties before the court. It was in fact an existing resolution which was issued before the dispute arose (see p 122 of exh AKI2). Since Rohana Yusuf J had allowed the summary judgment application and the same had been duly overruled by the Court of Appeal on 3 March 2010 in view of the conflict of opinion of the experts, the trial of the matter is still open and this court is at liberty to refer the Shariah issue to SAC. The next question is: under which provision should this court proceed upon?

C

D

Applicable law

E **[30]** It was submitted on behalf of Tan Sri Khalid that BBA facility was executed on 30 April 2001 and that both the consolidated suits were filed in May 2007. Act 701 only came into force on 25 November 2009, subsequent to the filing of the suits. Therefore, s 56 and s 57 of the Act 701 could not be applied retrospectively.

F

[31] Reliance had been placed on the authorities such as *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 AC 553, *Lim Phin Kiaan v Kho Su Ming* [1996] 1 MLJ 1, *Lee Chow Meng v Public Prosecutor* [1978] 2 MLJ 36, *Goopan s/o Govindasamy v A Subramaniam & Anor* [1980] 2 MLJ 64 where learned counsel for Tan Sri Khalid concluded that in view of the fact that the application of s 56 and s 57 of the Act 701 would affect Tan Sri Khalid's vested rights to lead expert evidence, to have the issue of Islamic law determined by the court as the final arbiter of the subject and to challenge the determination by SAC on appeal bearing in mind the binding status of SAC ruling even on the Court of Appeal and the Federal Court, s 56 and s 57 of the Act 701 could not be applied retrospectively to the case at hand.

G

H

[32] I am sure that Tan Sri Khalid must have felt extremely uncomfortable and apprehensive for the implementation of Act 701 in particular s 56 and s 57 which supersede the repealed CBA. This is because, prior 25 November 2009, it was the repealed CBA that applicable. Relying on s 16B(8) of the repealed CBA, if there was any question concerning a Shariah matter in any proceedings before the court, the court *may* take into consideration any written directive issued by BNM or the court *may* refer such question to SAC, the ruling of

I

which shall be taken into consideration by the court in arriving at its decision. However, the said position has changed since the introduction of Act 701 which came into effect on 25 November 2009. The non binding effect under s 16(B)(8) of the repealed CBA had been taken away should a ruling have been passed by SAC upon a reference by a court under s 56(1)(b).

[33] It is necessary at this stage to refer to s 16(B)(8) of the repealed CBA. The section reads as follows:

> (8) Where in any proceedings relating to Islamic banking business, takaful business, Islamic financial business, Islamic development financial business, or any other business which is based on Syariah principles and is supervised and regulated by the Bank before any court or arbitrator any question arises concerning a Syariah matter, the court or the arbitrator, as the case may be, may —
>
> (a) take into consideration any written directives issued by the Bank pursuant to subsection (7); or
>
> (b) refer such question to the Syariah Advisory Council for its ruling.

[34] Tan Sri Khalid argued that the decision of *Alias*'s case is not clear as to whether ss 56 and 57 of the Act 701 could be applied retrospectively. The court made reference to the decision of the Court of Appeal in *Tribunal Tuntutan Pembeli Rumah v Westcourt Corp Sdn Bhd and other appeals* [2004] 3 MLJ 17; [2004] 2 CLJ 617 where Richard Malanjum JCA had this to say at pp 625–627:

> [w]e find that the argument advanced for the respondents is premised on at least two assumptions. Firstly, that the date in a sale and purchase agreement is material in determining the jurisdiction of the Tribunal. Secondly, any award given for a breach of a sale and purchase agreement entered into prior to the appointed date, particularly where the breach was before that date, would tantamount to allowing criminal law to operate retrospectively since it is now punishable being an offence for any failure to comply with or satisfy such award. This argument of course relates to the legal principle that criminal law cannot be made to operate retrospectively unless specifically stipulated, (see *Dalip Bhagwan Singh v Public Prosecutor* [1997] 4 CLJ 645).
>
> Tribunal, it is s 16N and in particular sub-s 16N(2) thereof that provides the perimeter of the jurisdiction of the Tribunal.
>
> Sub-section 16N(2) does not stipulate a cut off point by reference to date of agreement vis-a-vis jurisdiction. All that is required of the Tribunal in assuming jurisdiction to hear a claim presented before it is to verify whether it is within the ambit of sub-s 16N(2) …
>
> We do not think there should be any additional or prerequisite term to be read into the provision. To do so would tantamount to adding what is not in the statute. And that should not be done since judges are not legislators. That was echoed in *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39 …

A

> To limit therefore the jurisdiction of the Tribunal to claims based on sale and purchase agreements entered into after the appointed date would tantamount to restricting the jurisdiction of the Tribunal which Parliament never intended to do so. It is absurd in our view to say that Parliament proceeded to legislate for the establishment of the Tribunal well aware that it would only begin to serve its purpose a few years later since it would be inconceivable for claims to arise on breaches of sale and purchase agreements entered into as recent as the appointed date. Meanwhile the claims of homebuyers based on breaches of sale and purchase agreements entered into prior to the appointed date would continue to languish under the present set up. Surely that must have been the very mischief which Parliament intended to address when it legislated for the establishment of the Tribunal.

B

C

[35] On hindsight, with all humility, the court agrees that the language used in *Alias*'s case has imported confusion on the true effect of the ruling on this issue. What the court intended to state was this: since there is no limitation imposed on SAC in the performance of its statutory duty in Act 701, ss 56 and 57 could be applied retrospectively. This would fit into the analytical legal framework as expounded by the court in the judgment.

D

[36] In my judgment, s 56 and s 57 of the Act 701 are procedural in nature. In this context, it would be apt to deal with as to what is procedural and what is substantive. Law Commission of India, 193rd Report had this to say:

E

> 'Procedural law' is one which deals with the procedure in Courts which has to be followed by the parties to seek vindication of their rights. The rights which they seek to vindicate in the Court through the said procedure are the substantive rights. We shall be elaborating these aspects in the succeeding chapters. A procedural law whenever made, applies to all pending proceedings unless its application is restricted to apply prospectively. On the other hand, a substantive law is always prospective in its application unless the legislature gives it retrospective effect. While it is a general principle of law no statute shall be construed so as to have retrospective effect unless its language is such plainly to require such a construction, that principle has not been applied to procedural statutes. The reason is that while substantive rights vested in persons cannot be interfered with by legislation except by clear language or by necessary implication, the position with regard to procedural law, is different. This is because nobody can have a vested right in any particular form much less in an older form of procedure.

F

G

H

[37] There is presumption that amendments to purely procedural statutes are to be given retrospective effect and amendments that change substantial rights be given prospective effects. The common law rule which operates in the absence of an express or implied statutory provision to the contrary, is that amendments to statutes which are purely procedural are to be given retrospective effect, and amendments to legislation that affect substantive rights are to be given prospective effect, (see *Maxwell v Murphy* [1957] HCA 7; (1957) 96 CLR 261; *Newell v The King* [1936] HCA 50; (1936) 55 CLR 707).

I

[38] The court is aware that although it has often been said that the presumption against statutory retrospective does not apply to procedural provisions, the realization has grown that the distinction between procedural and substantive provisions cannot always be decisive in the context of statutory interpretation. Thus, in *Yew Boon Tew v Kenderaan Bas Mara*, Lord Brightman said:

> A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is however said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.
>
> But these expressions 'retrospective' and 'procedural', though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (eg because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (eg because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself.

And at p 839 d to f:

> whether a statute has a retrospective effect cannot in all cases safely be decided by classifying the statute as procedural or substantive … Their Lordships consider that the proper approach to the construction of …[an Act] … is not to decide what label to apply to it, procedural or otherwise, but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations.

[39] In similar vein, in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamhip Co Ltd, The Boucraa* [1994] 1 AC 486, 586F, Lord Mustill said:

> Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value in diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the

A consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say.

B **[40]** In the light of above, it does not follow that once an amending statute is characterised as regulating procedure it will always be interpreted as having retrospective effect. It will depend upon its impact upon the existing substantive rights and obligations. If those substantive rights and obligations remain unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure C was not intended to apply.

[41] In the case of *Curtis v Johannesburg Municipality* 1906 TS 308, Innes CJ had this to say at p 312:

D Every law regulating legal procedure must, in the absence of express provision to the contrary, necessarily govern, so far as it is applicable, the procedure in every suit which comes to trial after the date of its promulgation. Its prospective operation would not be complete if this were not so, and it must regulate all such procedure even though the cause of action arose before the date of promulgation, and even E though the suit may have been then pending. To the extent to which it does that, but to no greater extent, a law dealing with procedure is said to be retrospective.

(See also *Keith Seller v Lee Kwang and Tennakon v Lee Kwang* [1980] 1 LNS 36 (FC))

F **[42]** In the case of *Howard Smith Paper Mills Ltd et al v The Queen* [1957] SCR 403, the Supreme Court of Canada considered new legislation which provided that a document (even an 'inter-office memorandum') found in possession of an accused, were admissible in evidence as prima facie evidence of anything recorded therein as having 'done, said or agreed upon' by the accused, G or by the agent with the accuser's authority. The court held that the legislation was applicable to events which had occurred before its commencement. Catwright J said at p 476:

While [the new legislation] make a revolutionary change in the law of evidence, it H creates no offence, it takes away no defence, it does not render criminal any course of conduct which was not already so declared before its enactment, it does not alter the character or legal effect of any transaction already entered into; it deals with a matter of evidence only and in my opinion, the learned Trial Judge was right in holding that it applied to the trial of the charge before him.

I (See also *Lim Sing Hiaw v Public Prosecutor* [1965] 1 MLJ 85; *Gerald Fernandez v Attorney-General, Malaysia* [1970] 1 MLJ 262; and *Haw Tua Tau v Public Prosecutor* [1980] 1 MLJ 2)

[43] So too here. There would be no adverse implement of any pre-existing

substantive right of Tan Sri Khalid. It would entail nothing more than the application of a new procedure as far as Shariah issue is concerned; the only difference is that as from 25 November 2009, the discretionary power of the court to take into consideration any written directive issued by BNM or the court may refer such question to SAC where there was any question concerning a Shariah matter in any proceedings before the court had been taken away and the ruling of SAC is binding on the court.

[44] To my mind, the proposition that Tan Sri Khalid has a vested right to lead expert evidence is untenable because SAC is a statute appointed expert. SAC has been tasked with ascertaining Islamic law for the purpose of Islamic financial business since the amendment to the Central Bank Malaysia Act, 1958 in 2003, well before this action was brought before the court.

Constitutionality of s 56 and s 57 of the Act 701

[45] Coming to the next contention of Tan Sri Khalid, viz, that whether s 56 and s 57 of the Act 701 contravene the Federal Constitution, the issue on the constitutionality of the said provisions had been fully ventilated and decided in previous decision of this court in *Alias*'s Case. I do not wish to repeat the principles and to once more explain the reasoning behind the judgment. To recap, I had already concluded that:

(a) the High Courts will only have jurisdiction and power as long as it is conferred by Parliament under the federal law;

(b) s 56 and s 57 of the Act 701 are valid federal laws enacted by Parliament pursuant to Item 4(k) of the Federal List (List I) in the Ninth Schedule of the Federal Constitution;

(c) should there any question concerning a Shariah matter, this court has to invoke s 56 of the Act 701;

(d) SAC is not a position to issue a new *hukum syara*', but only to find out which one of the available *hukum* is best applicable in Malaysia for the purpose of ascertaining the relevant Islamic law concerning the question posed to them; and

(e) SAC cannot be said to perform a judicial or quasi-judicial function. The function of SAC is confined to the ascertainment of the Islamic law on financial matter. The court still has to decide the ultimate issues which have been pleaded.

[46] Before I conclude, perhaps it would be useful for me to add a few words as to why civil courts may not be sufficiently equipped to deal with the issue whether a transaction under Islamic banking is in accordance to the religion of Islam or otherwise. Civil courts are not conversant with the rubrics of *Fiqh*

A *Al-Muamalat* which is a highly complex yet under-developed area of Islamic jurisprudence. In applying Islamic law to determine the parties' right under a contract, a civil judge had to conduct an extensive inquiry into Islamic law and make an independent determination of Shariah principles.

B **[47]** Even since long time ago, the civil courts have experienced no small difficulty in ascertaining the Islamic law when Markby J made this following observation in *Khajah Husain 'Ali v Shazadih Hazera Begum*, 12 WR, at pp 344–347:

C

> As I should point out presently, the means of discovering the Islamic law which this court possesses are so extremely limited that I am glad to avail myself of any mode of escaping a decision on any point connected therewith.

D **[48]** While examining the constraints faced by the Islamic financial services in relation to dispute resolution, Engku Rabiah Adawiah, a law lecturer and now a member of SAC observed:

> In the case of disputes arising between an Islamic financial institution and its clients, they will have to refer the matter to the civil or common law courts that have jurisdiction to hear the litigation. This may result in decisions that may not comply with the Shariah rules. This problem is further exacerbated by the non-existence of any substantive law on Islamic financial services and banking practices in such countries. In short, although the transactions entered by the parties may be Shariah compliant in the first place, but upon enforcement of the contracts, the court may make orders and decisions that may sideline the Islamic legal principles.
>
> (See *Engku Rabiah Adawiah bt Engku Ali, 'Constraints and Opportunities in Harmonization of Civil Law and Shariah in the Islamic Financial Services Industry',* [2008] 4 MLJ i at p ill).

E

F

G **[49]** Fakihah Azahari, a lawyer, in *'Islamic Banking: Perspective on Recent Case Development',* [2009] 1 MLJ xci at p cxxvi had this to say:

> When considering issues on Shariah, it is essential for the person so entrusted with the task to be well versed in the knowledge of Shariah or at the very least seek the opinions and advice of those in possession of Shariah knowledge. It is indeed a great responsibility that one undertakes in presenting Shariah issues and in the dispensation of decisions which should reflect an equitable solution. In *surah* al-Nisa':59, Allah exhorts man to obey Him, His Messenger and those charged with authority. The people 'charged with authority' in the presence context, are those who are recognised as experts and knowledgeable in Shariah including issues on Islamic banking and finance.
>
> From a perspective, the knowledge of Shariah and particularly Islamic financing is a combination of three main fields — Shariah jurisprudence, Islamic economics and philosophy. In Shariah jurisprudence, the study of legal maxims and the Islamic law

H

I

of evidence is of paramount importance in understanding Islamic financing. The realm of legal maxims and the Islamic law of evidence provide a methodology for resolving issues and disputes and providing innovative solutions to any issue on Islamic financing. An understanding of economics in general with special reference to Islamic economics would enable practitioners to establish parameters of Islamic financing whenever the two worlds of conventional finance and Shariah principles clash. Philosophy takes into consideration the historical aspects of the journeys and past experiences of the Islamic financing product or development so as to incorporate the best feature for the financing product.

[50] Islamic law is not codified. Historically, Islamic legal orthodoxy formed around those private scholars who distinguished themselves by education, dialectical skill, and popularity with students and the public who consulted them. Over the years, many schools of law emerged as student collected the lectures and legal opinions of influential jurists and eventually wrote commentaries upon them. With a sufficient number of disciples preserving and expanding the work of a particular jurist, that jurist's corpus of opinions and accompanying legal methodology became known as 'madzhab' (literally, 'path' or 'road to go') — school of Islamic law. These mazhabs were the means by which the *fiqh* was produced, preserved and transmitted in Muslim societies. While there is be unanimous agreement over what constitutes sources of law in Islam (*al-Quran, Sunnah, Qiyas* and *Ijma*'), differences exist in the level of comfort that jurists have when turning to the last two sources (*Qiyas* and *Ijma*'). These differences explain why different mazhab developed over the years, each contributing different interpretation of Shariah. (See generally *Shaykh Muhammad al-Khudri [1981], 'Tarikh al-Tashri' al-Islami', Beirut: Dar al-Fikri; Masud, Muhammad Khalid, Brinkley Morris Messick and David S Powers (eds) [1996], 'Islamic Interpretation: Mufti and Their Fatwas', (Cambridge, MA: Havvard University Press); Sir Abdul Rahim, 'The Principles of Islamic Jurisprudence According to The Hanafi, Maliki, Shafih & Hanbali Schools', lllrd Reprinted 2006, 'Islamic Financial System-Principles & Operations', ISRA, Chapter 5, Frank E Vogel, 'Islamic Law and Legal System: Studies of Saudi Arabia', (2000))*.

[51] So, if the validity of a contract is challenged before a civil court, the critical questions to be asked are:

(a) to what source would a judge deciding to case refer;

(b) if there are conflicting opinions among madzhabs or Islamic jurists, which madzhab or Islamic jurists should he/she adopt; and

(c) if there is a conflict between Islamic law and civil laws applicable to the matter, which law should take precedence?

[52] An example from the English cases illustrates this problem. This is the

A case of *Bank Shamil of Bahrain v Beximco Phamaceutical Ltd & others* [2004] All ER (D) 280. The dispute arises due to the default payment by the defendants and after the occurrence of various termination events under the agreements, the bank issued formal court proceedings and made an application to the court for summary judgment. As part of the term of the agreement, the parties B decided that 'jurisdiction over any legal proceedings arising out of or in connection with this agreement' and parties' choice of law was stated in this following way:

> Subject to the principles of Glorious Sharia'a, this agreement shall be governed by C and construed in accordance with the laws of England.

[53] The main concern in this case is the difficulties imposed on the English court where it was instructed by the parties to consider Islamic law principles. Mr Justice Morrison said: D

> … it cannot have been the intention of the parties that it would ask this secular court to determine principles of law derived from religious writings on matters of great controversy …

E

[54] Thus, in order for the court to decide a Shariah law issue in this case, 'it needs to have it's own view of the position under the Sharia'a law'. However, the task will be difficult, if not impossible, for a secular court that lacks of required knowledge to apply Islamic law, as Lord Justice Potter observed in his F significant speech in the decision of Court of Appeal in the case, most of the classical Islamic law on financial transactions is not contained as 'rules' or 'law' in the al-Quran and Sunnah but is based on the divergent views held by established schools of law (mazhab) formed in a period roughly between 700 and 850 CE. As a result, many of the commercial issues are still quite debatable G as it is made up of 'conflicting pronouncements'. Consequently, the court held that is was 'improbable in the extreme, that the parties were truly asking (the courts) to get into matters of Islamic religion and arthodoxy'.

[55] In my considered opinion, it is advisable and practical that the question H as to whether Islamic banking business is in accordance with the religion of Islam or otherwise be decided by eminent jurists properly qualified in Islamic jurisprudence and not by judges of the civil courts. This is to avoid embarrassment to Islamic banking cases as a result of incoherent and anomalous legal judgments. The applicable law to Islamic banking has to be I known with certainty. Otherwise, lawyers, bankers and their customers are left to wonder which is in fact the correct law.

[56] Even if expert evidence is allowed to be given in court to explain or clarify any point of law relating to Islamic banking, civil judges would be in a

difficult situation to decide because the divergence of opinions among Islamic jurists and scholars to which the opposing experts might have and which they will urge the court to adopt may be so complex to enable civil judges to make an independent determination of Shariah principles.

[57] Thus, as has been expounded in *Alias*'s case, the necessity of a special body like SAC to ascertain the Islamic law most applicable in Malaysia especially in this Islamic banking industry is undeniable. Difference of opinion on Shariah issues relating to Islamic banking should be resolved within SAC.

[58] In the upshot, I allowed encl 59 with costs in the cause.

Application allowed with costs in the cause.

Reported by Kohila Nesan

TAN SRI ABDUL KHALID IBRAHIM

v.

BANK ISLAM MALAYSIA BHD & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
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*

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*

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*

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

A 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 B 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 C 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 D 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 E 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 F 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 G 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 H (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):

I

(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 s. 16B(7), it would not be wrong to assume that when Bank Negara issued directives involving Syariah matter it would have the B 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 status of the BBA Agreement. C 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 must be complied with in D 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)

E

(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); M/s Thomas Philips
B

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 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 Court 1980.
D
E

[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 Berhad. Both Bank Islam (L) Ltd and Bank Islam Malaysia Berhad will hereafter be referred to interchangeably, as "the bank".
F

Background Facts

G

[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 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).
H
I

Restructuring

A

[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;

B

C

(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.

D

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

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

E

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.

F

(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.

G

(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.

H

(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.

I

(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

A any time.

(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 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 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.

E

F

G

H

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

A 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, B 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 C 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 D 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 E 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

F **[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 G 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 H 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 I

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,

A 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 B 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 C (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 D 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 E 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 F 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 G 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 H 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 I 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

A 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 B 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 C 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 D 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 E 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 F 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 G 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 H 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, I 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

A **[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. B (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 C 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 D 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 E 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. F 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 G 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 H 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 I 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.

DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO. W-02(IM)-3019-12/2011

ANTARA

TAN SRI ABDUL KHALID IBRAHIM … PERAYU

DAN

BANK ISLAM MALAYSIA BERHAD … RESPONDEN

(Dalam perkara Guaman Sivil No D4-22A-216-2007
Dalam Mahkamah Tinggi di Kuala Lumpur

Antara

Bank Islam Malaysia Berhad … Plaintiff

Dan

Tan Sri Abdul Khalid bin Ibrahim … Defendan)

CORAM:

LOW HOP BING, JCA
ZAHARAH BINTI IBRAHIM, JCA
AZIAH BINTI ALI, JCA

LOW HOP BING JCA
DELIVERING THE JUDGMENT OF THE COURT

I. APPEAL

[1] The Appellant/Plaintiff ("Khalid") has brought this Appeal against the decision of **Zawawi Salleh J** in allowing the Respondent/Defendant's ("Bank Islam's") Application in encl 59 ("the Application") to refer Shariah Questions to Bank Negara's Shariah Advisory Council ("SAC") for its ruling pursuant to s.56 of the Central Bank of Malaysia Act 2009 ("the Act").
(A reference hereinafter to a section is a reference to that section in the Act).

[2] We have been informed by learned counsel that on the issues raised in this Appeal, so far there has been no reported judgment by the Court of Appeal. We now set out our view on the new vista ventilated in this Appeal which we dismissed on 14 May 2012.

II. FACTUAL BACKGROUND

[3] In 2001, Bank Islam extended an 'Al-Bai Bithaman Ajil' Islamic financing facility ("BBA Facility") to Khalid. The terms of the BBA Facility are expressly stated in Bank Islam's Letter of Offer dated 17 April 2001, a Master Revolving BBA Agreement dated 30 April 2001, a Memorandum of Charge of Shares, a Fund Administration and

Custodian Agreement and an Asset Purchase Agreement dated 30 April 2001 (collectively, "the BBA Facility Agreements").

[4] On 10 May 2007, Khalid instituted a High Court Suit against Bank Islam ("Khalid's Suit") seeking inter alia declarations that:

(1) Under the Islamic Banking Act 1983, the BBA Facility Agreements were agreements which Bank Islam was not licensed to offer and/or enter into; and

(2) The BBA Facility was not in accordance with the religion of Islam and hence Bank Islam was in breach of its licence issued under s.3 of the Islamic Banking Act 1983.

[5] On 24 May 2007, Bank Islam filed a separate High Court Suit ("Bank Islam's Suit") against Khalid for breaches of the terms of the BBA Facility, seeking recovery of monies due and owing from Khalid.

[6] Khalid's Suit and Bank Islam's Suit were consolidated ("the Consolidated Suits") vide Order of Court dated 15 May 2008, with Khalid as the Plaintiff, and Bank Islam as the Defendant in the Consolidated Suits.

[7] On 13 June 2011, Bank Islam made the Application to the High Court to refer to the SAC for its ruling on Shariah Questions arising in the Consolidated Suits.

[8] Khalid objected on the ground, inter alia, that s.56 and s.57 were unconstitutional.

[9] On 13 July 2011, pursuant to s.84 of the Courts of Judicature Act 1964, the High Court referred the question concerning the constitutionality of s.56 and s.57 to the Federal Court for its determination, but the Federal Court declined to do so because the High Court has yet to make a ruling on whether there existed any Shariah Question in the Consolidated Suits. The Federal Court then remitted the matter to the High Court.

[10] On 18 November 2011, **Zawawi Salleh J** heard the Application. On 1 December 2011, he held that there were Shariah Questions which he identified and referred to the SAC for its ruling.

[11] Thereafter, Khalid lodged the instant Appeal.

III. PREVIOUS "REFERENCE": *FUNCTUS OFFICIO*

[12] Learned counsel Mr Malik Imtiaz Sarwar (Ms Asma Mohd Yunus and Mr Azinuddin Karim with him) argued for Khalid that **Zawawi Salleh J** had failed to appreciate that the Court's power to refer the Shariah Questions was "spent" or the High Court was *functus officio* in view of a previous "reference" by **Rohana Yusuf J** in ***Tan Sri Khalid bin Ibrahim v Bank Islam Malaysia Bhd and Another Suit*** **[2009] 6 MLJ 416 HC** ("**Rohana J**'s **judgment**") under

s.16B of the (then) Central Bank of Malaysia Act 1958 ("the (then) 1958 Act").

[13] Bank Islam's learned counsel, Mr Tommy Thomas (assisted by Mr Ganesan Nethi) asserted that, in fact, **Zawawi Salleh J** had correctly appreciated that the so-called previous "reference" made by **Rohana Yusuf J** to the SAC pursuant to s.16B of the (then) 1958 Act was a request to the SAC to ascertain if there was any existing ruling by the SAC in respect of 'Bai Bithaman Ajil' Islamic financing contracts ("BBA contracts"). It was not a reference to the SAC for a ruling on a Shariah Question.

[14] The essence of the question raised in the aforesaid submissions may be formulated as follows:

> "Upon a proper perusal of **Rohana J**'s **judgment**, was the High Court *functus officio* and hence the power of the High Court to make a reference to the SAC was 'spent' in view of a previous 'reference'?"

[15] Upon a careful reading of **Rohana J**'s **judgment**, we have no difficulty in holding that the so-called previous "reference" under s.16B of the (then) 1958 Act was merely a request for information as to whether there was any existing ruling by the SAC pertaining to BBA contracts. At p.426 A-B thereof, **Rohana Yusuf J** has rightly said, "I had caused an enquiry to be made to the SAC as to whether a ruling has been made on the status of the BBA agreement." That

being the case, it is abundantly clear to us that there was no reference whatsoever to the SAC for a ruling on Shariah Questions. The SAC was not asked to answer any specific question.

[16] In the circumstances, we find no error on the part of **Zawawi Salleh J** in classifying the request as an enquiry to be made to the SAC as to whether a ruling has been made on the status of the BBA agreement. It is certainly not a reference to the SAC for its determination on a specific Shariah Question. As there was no previous reference to the SAC for a ruling, the High Court could not be said to be *functus officio* or to have "spent" the power to make a reference. **Zawawi Salleh J** is able to make the reference which has now become the subject matter of the instant Appeal. Our answer to the above question is therefore in the negative.

IV. CONSTITUTIONALITY OF S.56 AND S.57

[17] Khalid's second point was that **Zawawi Salleh J** erred in failing to appreciate that s.56 and s.57 are unconstitutional, being in contravention of Part IX and Articles 8 and 74 of the Federal Constitution, in that the SAC is "usurping" the functions of the Courts in ascertaining Islamic law. (A reference hereinafter to a Part and an Article is a reference to that Part and Article in the Federal Constitution).

[18] In response, Bank Islam relied on Article 74(1), Part IX and Article 121 to support the contention that s.56 and s.57 are constitutional.

[19] These submissions touching on the constitutionality or otherwise of s.56 and s.57 attract the application of the principles of constitutional interpretation. I have the privilege of embarking on a discussion of these principles in e.g ***PP v Mohd Noor Bin Jaafar*** **[2005] 6 MLJ 745 HC;** ***Dato' Hari Menon @ Dato' T Puraharan a/l CP Ramakrishnan (Suing as Legal Representative of DYMM Tuanku Jaafar Ibni Almarhum Tuanku Abdul Rahman, Yang DiPertuan Besar Negeri Sembilan Darul Khusus) v Texas Encore LLC & Ors*** **[2005] 4 MLJ 506 HC;** and ***Pantai Bayu Emas Sdn Bhd & Ors v Southern Bank Bhd*** **[2008] 6 MLJ 649 CA**. Other authorities which incorporated these principles include ***Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus*** **[1981] 1 MLJ 29 FC;** ***Faridah Begum bte Abdullah v Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al Mu'adzam Shah*** **[1996] 1 MLJ 617 SC;** and ***Sukma Darmawan Madja v Ketua Pengarah Malaysia & Anor*** **[1999] 1 MLJ 266 CA**. As these principles have been succinctly stated therein, we respectfully adopt and apply them in our interpretation of the aforesaid provisions of the Federal Constitution.

[20] We take the view that the constitutionality of s.56 and s.57 is to be tested by reference to the legislative powers of Parliament to enact these sections. Article 74(1) empowers Parliament to make laws with respect to any of the matters enumerated in the Federal List (List 1), or the Concurrent List (List 3), of the Ninth Schedule to the Federal Constitution. Item 4 (k) of List 1 clearly provides that Parliament is empowered to make laws in respect of:

> "4. Civil and criminal law and procedure and the administration of justice, including -
>
> …
>
> (k) ascertainment of Islamic law and other personal laws for purposes of federal law"

[21] Banking is a matter within the Federal List and the Islamic Banking Act 1983 as well as the Central Bank of Malaysia Act 2009 are clearly federal laws. Thus, s.56 and s.57 are within Parliament's power to enact. (I am grateful to my learned sister **Zaharah binti Ibrahim JCA** for her suggestion to include this paragraph as an integral part of our judgment herein).

[22] S.56 and s.57 are applicable without discrimination to all parties who are in the same circumstances and so cannot be said to have contravened Article 8 governing fundamental liberties generally and equality before the law as well as equal protection of the law specifically.

[23] On the issue as to whether there is any usurpation by the SAC of the powers and jurisdiction of the Courts, we need only to examine Part IX which provides for the Judiciary and the functions, powers and jurisdiction of the Courts. Under this Part, Article 121(1) vests the judicial powers of the Federation in the Courts in such manner as may be conferred by or under federal law. So long as Parliament in its wisdom enacts laws for this subject matter, our Courts shall be competent to perform the functions, or to exercise the powers and jurisdiction conferred thereunder.

[24] Next, the statutory duty and function of the SAC is to ascertain Islamic financial matters or business only. It does not hear evidence nor decide cases. S.56 and s.57 merit reproduction as follows:

> **"56. Reference to Shariah Advisory Council for ruling from court or arbitrator**
>
> (1) Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be shall -
>
> (a) take into consideration any published rulings of the Shariah Advisory Council; or
>
> (b) refer such question to the Shariah Advisory Council for its ruling.

(2) Any request for advice or a ruling of the Shariah Advisory Council under this Act or any other law shall be submitted to the secretariat.

57. Effect of Shariah rulings

Any ruling made by the Shariah Advisory Council pursuant to a reference made under this Part shall be binding on the Islamic financial institutions under Section 55 and the court or arbitrator making a reference under Section 56."

[25] S.56 and s.57 contain clear and unambiguous provisions to the effect that whenever there is any Shariah Question arising in any proceedings relating to Islamic financial business before e.g any Court, it is mandatory for the Court to invoke s.56 and refer it to the SAC, a statutory expert, for a ruling. The duty of the SAC is confined exclusively to the ascertainment of the Islamic Law on financial matters or business. The judicial function is within the domain of the Court i.e to decide on the issues which the parties have pleaded. The fact that the Court is bound by the ruling of the SAC under s.57 does not detract from the judicial functions and duties of the Court in providing a resolution to the dispute(s) which the parties have submitted to the jurisdiction of the Court. In applying the SAC ruling to the particular facts of the case before the Court, the judicial functions of the Court to hear and determine a dispute remain inviolate. The SAC, like any other expert, does not perform any judicial function in the determination of the ultimate outcome of the litigation before the Court, and so cannot be said to usurp the judicial

functions of the Court. Hence, s.56 and s.57 are valid and constitutional.

V. DO S.56 AND S.57 HAVE RETROSPECTIVE EFFECT?

[26] Khalid's third and final point is that the learned Judge had erred in holding that s.56 and s.57 have retrospective effect.

[27] Bank Islam responded that no error was occasioned by the High Court.

[28] The question here is whether s.56 and s.57 have retrospective effect.

[29] In our view, s.56 and s.57 would not and cannot have retrospective effect if there has been a deprivation of Khalid's pre-existing rights. However, there is no such deprivation in the instant Appeal; s.56 and s.57 merely introduce and apply a procedure as far as Shariah Questions are concerned. Under the (then) 1958 Act, which was in force until 24 November 2009, the SAC's statutory duties and powers to make rulings as a statute-appointed expert, by ascertaining Islamic law for the purpose of Islamic financial matters or business on Shariah Questions, were already in existence. The word used in the (then) s.16B was "may". With effect from 25 November 2009, the discretionary power of the Court (to refer any Shariah Question to the SAC when such a question is before the Court) was amended to make the reference mandatory, and consequently the

SAC's ruling made pursuant to a reference is now binding on the Court by virtue of the word "shall" expressly enacted in s.56 and s.57.

[30] In the circumstances, we hold that **Zawawi Salleh** J is correct in taking the position that s.56 and s.57 have retrospective effect.

[31] As a matter of fact, the aforesaid three grounds have actually been ventilated and dealt with by **Zawawi Salleh J** in ***Mohd Alias bin Ibrahim v RHB Bank Bhd & Anor*** **[2011] 3 MLJ 26 HC**, wherein the learned Judge had also correctly stated the law. We hereby affirm his well-considered grounds expressed therein.

VI. CONCLUSION

[32] It is plain to us that Khalid's Appeal is devoid of merits. We dismiss this Appeal with costs in the cause as agreed by the parties herein. Deposit to be refunded to Khalid as the Appellant.

DATUK WIRA LOW HOP BING
Judge
Court of Appeal Malaysia
PUTRAJAYA

Dated this 14th day of May 2012

COUNSEL FOR APPELLANT:

Mr Malik Imtiaz Sarwar (Ms Asma Mohd Yunus
and Mr Azinuddin Karim with him)
Tetuan Thomas Philip
Peguamcara & Peguambela
No. 5-1, Jalan 22A/70A
Wisma CKL, Desa Sri Hartamas
50480 KUALA LUMPUR

COUNSEL FOR RESPONDENT:

Mr Tommy Thomas (assisted by Ganesan Nethi)
Tetuan Tommy Thomas
Peguamcara & Peguambela
No. 101, Jalan Ara
Bangsar
59100 KUALA LUMPUR

REFERENCE:

Tan Sri Khalid bin Ibrahim v Bank Islam Malaysia Bhd and Another Suit **[2009] 6 MLJ 416 HC**

Mohd Alias bin Ibrahim v RHB Bank Bhd & Anor **[2011] 3 MLJ 26 HC**

PP v Mohd Noor Bin Jaafar **[2005] 6 MLJ 745 HC**

Dato' Hari Menon @ Dato' T Puraharan a/l CP Ramakrishnan (Suing as Legal Representative of DYMM Tuanku Jaafar Ibni Almarhum Tuanku Abdul Rahman, Yang DiPertuan Besar Negeri Sembilan Darul Khusus) v Texas Encore LLC & Ors **[2005] 4 MLJ 506 HC**

Pantai Bayu Emas Sdn Bhd & Ors v Southern Bank Bhd **[2008] 6 MLJ 649 CA**

Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus **[1981] 1 MLJ 29 FC**

Faridah Begum bte Abdullah v Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al Mu'adzam Shah **[1996] 1 MLJ 617 SC**

Sukma Darmawan Madja v Ketua Pengarah Malaysia & Anor **[1999] 1 MLJ 266 CA**

THIS CIRCULAR TO SHAREHOLDERS ("CIRCULAR") OF BIMB HOLDINGS BERHAD IS IMPORTANT AND REQUIRES YOUR IMMEDIATE ATTENTION

If you are in any doubt as to the course of action to be taken, you should consult your Stockbroker, Bank Manager, Solicitor, Accountant or other professional adviser immediately.

Bursa Malaysia Securities Berhad ("Bursa Securities") takes no responsibility for the contents of this Circular, makes no representation as to its accuracy or completeness and expressly disclaims any liability whatsoever for any loss howsoever arising from or in reliance upon the whole or any part of the contents of this Circular.

(Company No. 423858-X)
(Incorporated in Malaysia under the Companies Act, 1965)

CIRCULAR TO SHAREHOLDERS

IN RELATION TO

THE PROPOSED RENEWAL OF SHAREHOLDERS' MANDATE FOR RECURRENT RELATED PARTY TRANSACTIONS OF A REVENUE OR TRADING NATURE

The Ordinary Resolution in respect of the Proposed Renewal of Shareholder's Mandate will be tabled at the Seventeenth (17th) Annual General Meeting ("AGM") of the Company to be held at Ballroom 1, Sime Darby Convention Centre, 1A, Jalan Bukit Kiara 1, 60000 Kuala Lumpur on Thursday, 15 May 2014 at 10.00 a.m. The Notice of 17th AGM together with the Form of Proxy are enclosed in the Annual Report of the Company.

The Form of Proxy must be completed and lodged at the registered office of BIMB Holdings Berhad at 31st Floor, Menara Bank Islam, 22 Jalan Perak, 50450 Kuala Lumpur, no later than forty-eight (48) hours before time stipulated for the AGM. The lodging of the Form of Proxy will not preclude you from attending and voting at the AGM should you subsequently wish to do so.

Last date and time for lodging the Form of Proxy: Tuesday, 13 May 2014 at 10.00 a.m.

This Circular is dated 23rd day of April 2014

The Plaintiffs proceeded with a civil action against the Defendant to recover the shortfall. The Court allowed the Plaintiffs' claim and the Defendant had filed an appeal against the decision but subsequently withdrew the appeal. The sum outstanding to Bank Islam as at 30 June 2013 is RM42,491,540.91. However, as per solicitor's advice, the Plaintiffs withheld the execution proceeding pending completion of transfer by way of private treaty. There has been no progress to this matter since then. As at March 2014, the status remained the same.

(b) On 9 February 2004, Bank Islam filed a civil suit against PC Auto Blast Sdn Bhd, Jaya Raj a/l A. Mariadas and Johnson a/l Mariadas (collectively "**the Defendants**") to recover the outstanding amount of RM13,145,946.46 under the financing facilities granted by the Bank to the Defendants. On 13 April 2004, the Bank withdrew the suit against the Defendants. On 17 August 2006, the Bank filed another civil suit against the Defendants to recover the outstanding amount of RM13,125,946.46 under the financing facilities granted by the Bank to the Defendants (as the amount claimed under the suit in 2004 was inaccurate). The Defendants filed a counterclaim seeking, amongst others, declarations that the agreements executed pursuant to the financing facilities were null and void for non-compliance with the Shariah principles and damages amounting to RM656,326.29.

On 30 September 2010, the court allowed the Bank's claim and struck out the Defendants's counterclaim.

On 28 October 2010, the court granted an order for sale. Bank Islam had successfully auctioned the property on 12 October 2011. However, the Bank did not receive the balance of auction proceeds from the successful bidder. Hence the property was put-up for auction again.

An auction was fixed on 14 May 2013 but was then postponed. Hearing to fix a new auction date has been fixed on 15 April 2014.

(c) On 7 March 2005, Bank Islam filed a civil suit against Commerce Resources Inc., Dato' Kamaruddin @ Kamaluddin bin Awang and Datuk Hiew Ming Yong ("**First Defendant**", "**Second Defendant**" and "**Third Defendant**" respectively, and collectively "**the Defendants**") to claim the outstanding amount of USD2,720,036.00 under the financing facilities granted by Bank Islam to the First Defendant. A judgment in default has been obtained against the First Defendant and the Second and Third Defendants being the guarantors for the financing facilities. However, further action against the First and Second Defendants were discontinued on the grounds that (a) there was no evidence of assets in the First Defendant and (b) the Second Defendant was successful in setting aside the Judgment In Default against him on technical grounds. Bank Islam was exploring other recovery strategies against the First and Second Defendants. Meanwhile, the Bank proceeded with bankruptcy proceedings against the Third Defendants but the bankruptcy notice was set aside by the Third Defendant. The matter is pending hearing date to be fixed by the court.

(d) On 24 May 2007, Bank Islam Malaysia Berhad ("**Bank Islam**") filed a civil suit against Tan Sri Abdul Khalid Ibrahim ("**the Defendant**") to recover the outstanding amount of USD18,251,806.13 under the financing facilities granted by Bank Islam to the Defendant. On 21 August 2009 the Court allowed Bank Islam's summary judgment application under Order 14 of the Rules of High Court. The Defendant filed an appeal and stay of execution. On 3 March 2010, the Court of Appeal allowed the Defendant's appeal and set aside the Summary Judgment entered against the Defendant. The trial dates were fixed on 2 to 4 August, 9 to 11 August and 23 to 26 August 2010. However, on 9 August 2010, the Defendant filed an application to recuse Justice Rohana (the Trial Judge) from hearing this matter. The Defendant claimed that there was a real danger of apparent bias on the part of the Trial Judge in hearing this action, pursuant to a letter from Bank Islam to Bank Negara Malaysia, referring to a conversation between one Encik Fazlur Rahman Ebrahim, then the COO of Bank Islam and the Trial Judge, in her capacity then as Deputy Head of BNM Islamic Banking and Takaful Department. The remaining dates for the trial were vacated to enable parties to file their affidavits. On 22 September 2010, the Court dismissed the Defendant's application and the Defendant filed an appeal.

On 1 November 2010, the Court of Appeal allowed the Defendant's appeal. The case was ordered to be heard before a new judge, YA Dato' Hj Mohd Zawawi Salleh. The case was then fixed for trial from 11 to 14, 18 to 21 and 25 to 28 July 2011. Bank Islam filed an application pursuant to Section 56 of the Central Bank of Malaysia Act to refer several Shariah issues to the Shariah Advisory Council (SAC) of Bank Negara Malaysia but the application was objected to by the Defendant. The Defendant raised several issues including constitutionality of the said section. On 7 July 2011, the High Court judge directed that the issue be referred directly to the Federal Court. On 25 October 2011, the Federal Court Judges declined to hear the matter and remitted the case back to the High Court for decision on Bank's application in respect of the on referral to the SAC of Bank Negara Malaysia.

On 1 December 2011, the High Court allowed Bank Islam's application to refer the Shariah issues to the SAC of BNM and on 8 December 2011, the Defendant appealed to the Court of Appeal against the order. On 14 May 2012 the Court dismissed the Defendant's appeal. The Defendant then filed an application for leave to appeal to the Federal Court. On 14 November 2012, the leave application was allowed by the Federal Court. The hearing was fixed on 24 April 2013 but was taken off and converted to a case management. The matter was then fixed for hearing on 2 September 2013 but was subsequently adjourned to 21 October 2013. No trial dates have been fixed by the Court pending the decision of the Federal Court on the Defendant's application. Hearing of the appeal on the SAC BNM issue has been fixed on 12 February 2014. No trial dates have been fixed by the High Court pending the decision of the Federal Court. In March 2014, the parties agreed to a term of settlement and during a case management fixed on 31 March 2014, the parties agreed for all legal actions to be deferred accordingly.

(e) In 2010, Tan Sri Abdul Khalid Ibrahim (hereinafter "**the Plaintiff**") filed a civil suit against Bank Islam alleging that Bank Islam and Permodalan Nasional Berhad purportedly conspired and/or acted in concert to cause loss to the Plaintiff by way of wrongfully recalling monies advanced to the Plaintiff by way of Bai Bithaman Ajil facility. There was no claim amount specified but the Plaintiff sought general damages and loss of profits. The matter was fixed for trial from 29 July 2013 to 2 August 2013 but was subsequently adjourned to 1 October 2013 to 10 October 2013. The trial was further adjourned to a new undecided date pending the decision by Federal Court on the appeal of SAC BNM issue. During a case management on 21 June 2013, the trial dates were vacated in view of the Defendant's application to the Federal Court in relation to the issues of referral of Shariah issues to the SAC BNM and the constitutionality of Section 56 of the Central Bank of Malaysia Act. The trial judge took note of the fact that the trial of another suit (as above) was outstanding, and that the findings of facts arrived at by the other court would be directly applicable to this suit. The trial of this suit would therefore be contingent on the conclusion of the other trial between the Plaintiff and Bank Islam. A case management for this matter has been fixed on 3 April 2014 for counsels to appraise the Court on the outcome of the Federal Court Appeal. Bank Islam's solicitors are of view that Bank Islam has strong case against the counterparty in both suits.

(f) On 27 August 2007, Bank Islam filed a civil suit against four (4) senior management staff of the then Bank Islam Labuan Ltd (BILL) ("**the Defendants**") claiming an amount of USD8,586,483.00 being the outstanding financing facilities granted by BILL to certain customers whose accounts had been in default, namely Faaris Investment Holding Plc, Profound Heritage Sdn Bhd, Commerce Resources Inc., Commerce Trading Inc., Crest Group, Crestek Inc. and Trident Timber Co. Ltd.

Bank Islam claimed that the Defendants had acted contrary to the interest of BILL and were in breach of their statutory duties, common law duty of care and skill and express and/or implied contractual duties.

The first and second defendants are no longer in BILL or Bank Islam's employment. Bank Islam had commenced internal disciplinary proceedings against the third and fourth defendants whereby the results of which their employment were terminated.

The matter was fixed for trial on 18 to 21 February 2013 but was postponed to 7 to 10 October 2013. Trial had proceeded on 9 October 2013 as the judge was on medical leave. During the trial, the judge had struck out D1 and D2's defense and witness statements as they were not filed within the time directed by the court earlier. On 10 October 2013, trial was postponed again to enable the court to hear D1 and D2's application to set aside previous order made by the court.

NOTA PENSTRUKTURAN AIR SELANGOR

LATAR BELAKANG PENSTRUKTURAN AIR

- Penstrukturan air yang diusahakan di Selangor (dan negeri-negeri lain) adalah lanjutan dari Akta Perkhidmatan Industri Air yang diluluskan Barisan Nasional di peringkat Persekutuan.

- Secara konsepnya, akta ini menuntut supaya semua aset air diserahkan dan dikawal oleh sebuah agensi Kerajaan Persekutuan bernama Perbadanan Aset Air Berhad (PAAB) milik penuh Kementerian Kewangan. Selepas aset air diambil alih oleh PAAB, ia akan memajak semula aset ini untuk digunakan oleh operator air yang membayar pajakan tahunan kepada PAAB.

- Harapannya ialah aset air dipunyai oleh Kerajaan Persekutuan, maka tanggungjawab untuk menyenggara dan menaiktaraf aset air ini dipikul oleh Kerajaan Persekutuan yang mempunyai lebih ruang kewangan untuk menanggung perbelanjaan.

- Tugas operator kemudiannya hanyalah untuk mengendalikan operasi aset air ini tanpa perlu memikul pelaburan modal untuk menaiktaraf aset air.

- Di Selangor, ada 4 syarikat konsesi yang memiliki aset air dan mengendalikan operasi air iaitu Syabas dan Puncak Niaga (dikawal melalui saham majoriti oleh Tan Sri Rozalli Ismail), ABASS (milik Kerajaan Negeri) dan Splash (usahama Kerajaan Negeri dan Gamuda dan syarikat dikawal Tan Sri Wan Azmi Hamzah).

BAGAIMANA PENGAMBILALIHAN ASET AIR AKAN DIBIAYAI KERAJAAN NEGERI

- Secara mudahnya, oleh kerana Kerajaan Persekutuan yang mengambil alih aset air, maka pengambilalihan aset air ini akan dibiayai Kerajaan Persekutuan melalui PAAB.

- Konsepnya, PAAB akan membuat nilaian berapa nilai aset air yang dipunyai oleh setiap syarikat konsesi. PAAB kemudiannya membuat tawaran untuk membeli aset-aset itu dari syarikat konsesi. Pembelian ini akan dibiayai melalui penerbitan bon (iaitu PAAB mendapatkan hutang dari pasaran hutang).

- Oleh sebab itu, kaedah nilaian untuk menentukan aset air adalah cukup penting. Jika kaedah nilaian yang berlainan digunakan, maka lainlah nilai aset yang perlu dibayar oleh PAAB dan makin tinggilah pajakan tahunan yang dibayar oleh Kerajaan Negeri.

- Ada beberapa kaedah nilaian yang boleh digunakan:

    1. Membuat nilaian berdasarkan aset air sedia ada dan membayar berdasarkan nilaian itu
    2. Membuat nilaian berdasarkan syarikat konsesi (berapa asetnya ditolak liabiliti dan untung ruginya setakat ini)
    3. Membuat nilaian berdasarkan pampasan ke atas berapa kerugian yang ditanggung oleh syarikat konsesi kerana konsesinya dihentikan lebih awal untuk membolehkan penstrukturan berlaku
    4. Atau kombinasi (1), (2) dan (3)
    5. Atau kaedah-kaedah mengikut formula yang ditentukan

- Walau bagaimana pun, sepatutnya kaedah nilaian yang diambil tidaklah boleh menyimpang dari konsep dan tujuan asal penstrukturan, iaitu untuk mengambil alih aset air oleh PAAB. Jika nilaian ke atas aset air ini adil, bebas dan diterima pakai oleh pakar antarabangsa yang boleh dilantik, keengganan syarikat konsesi untuk menerima nilaian ini dan menyerahkan aset bolehlah mendorong Kerajaan Pusat menggunakan kuasanya mengikut peruntukan akta Seksyen 114 untuk mengambil alih aset ini dan membuat pampasan, seperti mana kaedah biasa Kerajaan Negeri menggunakan kaedah pengambilan tanah dan membuat pampasan.

- Dalam proses penstrukturan air Pulau Pinang yang ditandatangani Kerajaan Pakatan Rakyat Pulau Pinang dengan Kerajaan Persekutuan dalam tahun 2011, hutang Kerajaan Pulau Pinang berjumlah RM655 juta dilupuskan dan ditukar dengan aset air dan tanah berkaitan. Kerajaan Pulau Pinang kemudian memajak kembali dari Kerajaan Pusat aset air itu pada kadar RM14.56 juta setahun sahaja.

- Penstrukturan itu menggunakan nilaian aset yang ditukar dengan hutang berbaki dan tidak melibatkan sebarang pampasan keuntungan dan lain-lain.

KAEDAH NILAIAN YANG DIGUNAKAN OLEH KERAJAAN SELANGOR

- Kaedah nilaian yang digunakan oleh Kerajaan Selangor ialah:

    1. Mengambil alih keseluruhan hutang syarikat konsesi
    2. Membayar bahagian ekuiti ("equity portion") iaitu pampasan keuntungan kepada pemegang konsesi

- Perbandingan jumlah tawaran oleh Kerajaan Selangor kepada syarikat konsesi swasta (tidak termasuk ABASS kerana ABASS adalah milik penuh Kerajaan Selangor) dalam tawaran yang ditandatangani melalui MOU mempunyai pecahan seperti berikut:

	Syabas	**Puncak Niaga**	**Jumlah Syabas + PN**	**SPLASH**	**Jumlah keseluruhan**
Tanggungan hutang (RM billion)	2.7	1.36	4.06	1.6	5.66
Bayaran keuntungan atau Bahagian ekuiti (RM billion)	0.438	1.2	1.638	0.251	1.889

- Ini bermakna selain daripada bebas dari tanggungan hutang, syarikat konsesi swasta juga mendapat keuntungan berbilion ringgit.
- Contohnya, kumpulan Puncak Niaga (meliputi Syabas yang mengendalikan sistem paip air dan Puncak Niaga Sdn Bhd yang mengendalikan loji pemprosesan air) akan menerima pampasan keuntungan sebanyak RM1.638 bilion.

- Malah, jumlah tawaran yang dimeterai melalui MOU kepada kumpulan Puncak Niaga ini lebih tinggi dari tawaran awal yang dibuat dalam Februari 2013 seperti berikut:

	Tawaran asal Februari 2013	**Tawaran MOU Mac 2014**	**Kenaikan**
Tanggungan hutang (RM billion)	Tidak berubah	Tidak berubah	Tidak berubah
Bayaran keuntungan/ Bahagian ekuiti (RM billion)	1.07	1.638	568 juta

- Dalam tempoh beberapa bulan, Kerajaan Selangor telah menaikkan pampasan keuntungan kepada Puncak Niaga (yang dikawal oleh tokoh yang rapat dengan Umno) sebanyak RM568 juta.

- Jika dibandingkan dengan nilai aset-liabiliti dan rekod keuntungan syarikat (kaedah nilaian 2) seperti yang biasa digunakan untuk menilai harga sesebuah syarikat, laporan kewangan terkini kumpulan Puncak Niaga bagi tahun kewangan berakhir 31 Disember 2012 adalah seperti berikut:

	RM Billion
Untung bersih	0.2327
Jumlah aset	13.4
Jumlah hutang/liabiliti	(13.5)
Nilai syarikat (aset *tolak* liabiliti)	(75 juta)

- Maknanya, jika kumpulan Puncak Niaga ini dijual pada pasaran terbuka tanpa rundingan, nilaian berdasarkan rekod keuntungan, aset dan liabiliti adalah syarikat tidak ada nilai.

- Tawaran di dalam MOU sebaliknya memberikan pampasan keuntungan sehingga RM1,638 juta kepada kumpulan Puncak Niaga iaitu RM1,700 juta lebih tinggi dari nilai pasarannya mengikut rekod keuntungan, aset dan liabiliti.

LATAR BELAKANG MOU

- Setelah proses rundingan yang berpanjangan, Kerajaan Negeri menandatangani MOU untuk memuktamadkan pengambilalihan industri air di Selangor.

- Dalam pertemuan dengan wakil rakyat PR pada 5 Mac 2014, Menteri Besar melalui pegawai-pegawainya mengesahkan bahawa MOU yang disiarkan di laman-laman internet adalah MOU yang sama ditandatangani, kecualilah beberapa perkataan yang ditukar di dalam Perkara 4(iii) dan 4(iv).

- Isu-isu yang ditimbulkan ekoran dari MOU itu akan diulas satu persatu di dalam bab seterusnya.

KENAPA TIBA-TIBA SEKARANG KERAJAAN PERSEKUTUAN BERSETUJU SEDANGKAN IA MENENTANG SELAMA INI?

- Menteri Besar memberikan dua sebab iaitu:

    1. Kerajaan Persekutuan tidak lagi mahu menangguhkan pembayaran hutang (bon) syarikat-syarikat konsesi seperti yang selama ini ditanggung oleh Kerajaan Persekutuan melalui pinjaman mudah alih. Ini akan menjadikan kumpulan Puncak Niaga muflis

    2. Kerajaan Persekutuan benar-benar mahu mempercepatkan Projek Langat 2 kerana pembiaya dari Jepun mengugut untuk menarik balik pinjaman

Komentar:

Jika ini asas utama, sudah tentu Kerajaan Selangor berada dalam keadaan yang kukuh dalam rundingan. Jika Kerajaan Persekutuan dan Puncak Niaga berkeras, ia akan muflis dan ada kesan besar kepada rekod ekonomi Kerajaan Persekutuan. Apatah lagi keterdesakan Kerajaan Persekutuan dalam pembiayaan Projek Langat 2 sepatutnya menjadikan kuasa rundingan kita kukuh.

Jika ini keadaannya, ada senario rundingan yang lebih baik kepada rakyat Selangor yang boleh mengurangkan pampasan kepada syarikat konsesi dan memaksa Kerajaan Persekutuan dan syarikat konsesi bersetuju dengannya.

KESAHIHAN MOU KERANA TIDAK DILULUSKAN EXCO

- Menteri Besar mengakui bahawa tidak ada satu kertas EXCO yang membincangkan kandungan akhir MOU yang ditandatangani. Maka, tidak ada satu kelulusan yang direkodkan oleh EXCO yang memberi kuasa kepada Menteri Besar untuk menandatangani MOU ini bagi pihak kerajaan dan rakyat Selangor.

- Yang ada hanyalah kemaskini perkembangan rundingan yang dibincangkan atau dimaklumkan dari semasa ke semasa. Menteri Besar beranggapan ini sudah memadai sebagai mendapat kelulusan EXCO kerana tiada yang membantah.

Komentar:

Makluman tanpa satu kelulusan rasmi yang dibentangkan dan dipersetujui oleh EXCO melalui kertas EXCO bukanlah satu kelulusan. Jika di masa hadapan Kerajaan Selangor ingin mencabar Kerajaan Persekutuan kerana tidak menunaikan janji di dalam MOU ini, atau jika syarikat konsesi menyaman Kerajaan Selangor dan MOU ini dirujuk, kesahihan MOU ini akan dipersoalkan dan dicabar di mahkamah. Keseluruhan EXCO perlu menjawab kenapa perkara ini tidak dititikberatkan dalam menjalankan tanggungjawab mereka.

MOU BERAT SEBELAH, HANYA MENGIKAT DI SEBELAH KERAJAAN SELANGOR

- Menteri Besar tidak memberikan jawapan kepada soalan ini, setakat mengatakan bahawa komitmen Kerajaan Persekutuan akan diikat melalui perjanjian-perjanjian yang akan ditandatangani.

Komentar:

Dalam keadaan kuasa rundingan Kerajaan Selangor cukup kuat berbanding Kerajaan Persekutuan seperti yang dihuraikan di atas, menjadi tanda tanya utama kenapa kelulusan Projek Langat 2 yang mengikat di sisi undang-undang dan tidak boleh ditarik balik diberikan serta merta sedangkan Kerajaan Persekutuan hanya memberi persefahaman.

Persoalan ini tidak boleh dijawab sehingga ke hari ini.

MOU MENYEBUT TAWARAN RM9.65 BILION, TIMBUL PERSOALAN MENGENAI RM2 BILION YANG TURUT DISEBUT

- Menteri Besar tetap mempertahankan bahawa RM2 bilion yang disebut di dalam Perkara 4(iii) adalah untuk dibayar kepada syarikat konsesi sebagai pampasan keuntungan (bahagian ekuiti seperti yang dihuraikan di atas). RM2 bilion itu bukanlah bayaran tambahan melebihi dari tawaran RM9.65 bilion yang diumumkan Menteri Besar.

- MOU mengesahkan bahawa jumlah bayaran Kerajaan Persekutuan sebanyak RM7.65 bilion untuk mengambil alih hutang-hutang syarikat konsesi tidak mencukupi untuk membayar tawaran keseluruhan termasuk pampasan keuntungan, sebab itu Kerajaan Selangor menjual aset airnya untuk mendapatkan RM2 bilion untuk menampung kos tambahan itu. Jika aset air Kerajaan Selangor tidak dijual, Kerajaan Selangor terpaksa mengambil hutang sebanyak RM2 bilion untuk membiayai urusniaga ini.

- Menteri Besar juga mengesahkan bahawa jumlah keseluruhan aset air yang perlu dipajak dari Kerajaan Persekutuan kelak ialah RM9.65 bilion (dan bayaran pajakan tahunan akan dikira dari RM9.65 bilion) walaupun RM2 bilion adalah hasil dari Kerajaan Selangor menjual asetnya kepada Kerajaan Persekutuan seperti Perkara 4(iii).

Komentar:

Jumlah yang perlu dibayar oleh Kerajaan Selangor masih tidak tetap kerana bergantung kepada sama ada syarikat-syarikat konsesi akan menerima tawaran menjelang 10 Mac 2014.

Jangkaan awal ialah kumpulan Puncak Niaga akan menerima tawaran ini kerana pampasan keuntungan sebanyak RM1,638 juta adalah lumayan.

ABASS dijangka akan menerima tawaran kerana ia menurut perintah Kerajaan Selangor.

Besar kemungkinan SPLASH akan menolak tawaran kerana merasakan penurunan dari tawaran awal terlalu besar.

Berbeza dengan kumpulan Puncak Niaga yang dinaikkan tawaran sebanyak RM568 juta, Kerajaan Selangor memotong tawaran kepada SPLASH (dari tawaran asal dalam bulan Februari 2013 kepada tawaran MOU) sebanyak RM2,100 juta.

Oleh itu, jumlah potongan sebegitu besar kemungkinan akan mendorong SPLASH untuk menolak tawaran.

Apabila ini berlaku, Menteri Besar berharap agar Kerajaan Persekutuan menggunakan kuasanya di bawah Seksyen 114 Akta untuk merampas aset air SPLASH dan menentukan pampasan. Besar kemungkinan SPLASH akan membawa perkara ini ke mahkamah untuk mendapatkan nilaian terbaik bagi asetnya.

Mengambil kira tawaran awal yang jauh tinggi (maksudnya Kerajaan Selangor awalnya menilai SPLASH lebih tinggi) serta pampasan keuntungan yang tinggi diberikan kepada kumpulan Puncak Niaga walaupun rekod aset liabiliti yang buruk – ada kemungkinan bahawa nilaian akhir yang dimuktamadkan oleh mahkamah atau pihak bebas adalah lebih tinggi dari nilaian yang dibuat di dalam MOU.

Oleh itu, jumlah RM9.65 bilion ini adalah jumlah yang paling minima perlu ditanggung oleh Kerajaan Selangor dengan mengandaikan bahawa semua syarikat konsesi akan menerima bulat-bulat tawaran itu.

Keadaan ini tidak realisitik.

Sebab itu, dengan juga cara Perkara 4(iii) ditulis iaitu "….**selain daripada tawaran KDEB,**…" tafsiran alternatif kepada RM2 bilion itu adalah ia dana tambahan hasil jualan aset air Kerajaan Selangor untuk merundingkan harga yang lebih tinggi dengan SPLASH apabila tawaran awal ditolak.

Dalam keadaan mana pun, jumlah akhir kos pengambilalihan mungkin lebih tinggi dari RM9.65 bilion yang diumumkan di dalam MOU. Apabila kesahihan dan tafsiran MOU pun boleh dicabar di mahkamah, jumlah sebenar sudah tentu akan berubah kelak mengikut tafsiran dan nilaian mahkamah.

KENAPA KERAJAAN PERSEKUTUAN HANYA MEMBAYAR RM7.65 BILION SEHINGGA KERAJAAN SELANGOR PERLU MENJUAL ASET UNTUK MENDAPATKAN RM2 BILION LAGI?

- MOU mengesahkan bahawa jumlah yang dibayar oleh Kerajaan Persekutuan untuk mengambilalih kesemua aset air yang dimiliki syarikat konsesi hanyalah RM7.65 bilion iaitu dengan menanggung hutang mereka.

- Menggunakan kaedah yang dimeterai oleh Kerajaan Pulau Pinang, aset air yang sama nilainya dengan hutang sebanyak RM655 juta dipindahkan kepada Kerajaan Persekutuan. Bayaran pajakan tahunan adalah berdasarkan aset RM655 juta itu.

- Keadaannya berbeza di Selangor kerana jumlah nilaian Kerajaan Persekutuan untuk aset-aset air hanyalah RM7.65 bilion dan tambahan RM2 bilion untuk pampasan keuntungan itu perlu pula dibayar sendiri oleh Kerajaan Selangor.

Komentar:

Konsep asal penstrukturan ialah pengambilalihan aset air oleh agensi persekutuan yang kemudiannya dipajakkan balik kepada Kerajaan Negeri supaya bayaran pajakan tahunan itu rendah.

Ini dicapai di Pulau Pinang – hutang sebanyak RM655 juta diambilalih oleh Kerajaan Persekutuan dan aset air yang berpadanan dengan jumlah itu diserahkan kepada Kerajaan Persekutuan. Setiap tahun, Kerajaan Pulau Pinang membayar sekadar 2.2% dari jumlah RM655 juta itu sebagai pajakan tahunan.

Keadaan berbeza di Selangor yang dimeterai di bawah MOU.

NOTA PENSTRUKTURAN AIR SELANGOR

Walaupun keseluruhan aset air syarikat konsesi diambil alih, hanya RM7.65 bilion dibayar oleh Kerajaan Persekutuan. Ini bermakna nilaian bagi aset-aset ini hanyalah RM7.65 bilion kerana itulah sahaja nilai yang mahu dibayar oleh Kerajaan Persekutuan.

Mengikut formula di Pulau Pinang, sepatutnya hanya RM7.65 bilion yang ditanggung dan pajakan tahunan adalah x% dari RM7.65 bilion ini.

Oleh kerana ada unsur pampasan keuntungan kepada syarikat konsesi, maka Kerajaan Selangor terpaksa menjual aset airnya untuk mendapatkan RM2 bilion tambahan untuk dibayar kepada syarikat konsesi.

Lebih dari itu, pajakan tahunannya adalah keseluruhan RM9.65 bilion termasuklah bayaran pampasan keuntungan kepada syarikat konsesi.

Sebab itu, soal RM2 bilion tambahan ini menimbulkan persoalan besar kerana ia semata-mata menguntungkan syarikat konsesi dan akan ditanggung oleh rakyat di masa depan, sedangkan perkara sama tidak berlaku di Pulau Pinang.

Dalam keadaan kuasa rundingan Kerajaan Selangor cukup kuat seperti yang dihuraikan di atas, kenapa Kerajaan Selangor tidak menekan Kerajaan Persekutuan supaya menggunakan formula yang sama di Selangor?

Lagi pun memang sudah dijangka bahawa akan ada syarikat konsesi yang tidak akan bersetuju dengan tawaran yang dibuat.

Satu senario yang boleh dirundingkan ialah supaya pengambilalihan ini adalah berasaskan nilaian aset seperti yang berlaku di Pulau Pinang tanpa unsur pampasan keuntungan. Dalam keadaan syarikat konsesi memang tertekan dan Kerajaan Persekutuan terdesak dengan Projek Langat 2, apakah ada kemungkinan Kerajaan Persekutuan dan syarikat konsesi bersetuju dengan RM7.65 bilion tanpa tambahan RM2 bilion?

PERBANDINGAN PENGAMBIL ALIHAN DI PULAU PINANG DAN SELANGOR

- Melalui MOU, perbandingan berikut boleh dibuat:

	PULAU PINANG	SELANGOR
Kaedah nilaian yang menentukan jumlah bayaran	Aset dipindahkan mengikut nilai hutang yang diambilalih	Aset dipindahkan mengikut nilai hutang yang diambilalih + Pampasan keuntungan kepada syarikat konsesi
Jumlah aset yang perlu dijual Kerajaan Negeri untuk membiayai pengambilalihan	Tiada, sekadar aset yang dipindahkan sebagai pertukaran kepada hutang yang diambilalih	RM2 bilion aset Kerajaan Negeri dijual kerana harga tawaran lebih tinggi dari jumlah aset yang ditukar dengan hutang yang diambialih
Jumlah aset yang menentukan bayaran pajakan tahunan	Hanya aset yang dipindahmilik sebagai pertukaran kepada hutang iaitu RM655 juta	Keseluruhan aset yang dipindahmilik sebagai pertukaran kepada hutang iaitu RM7.65 bilion

		+ Pampasan keuntungan kepada syarikat konsesi sebanyak RM2 bilion + Projek Langat 2 iaitu aset air baru yang dibina Kerajaan Persekutuan
Dana untuk membina empangan baru	Geran diberikan percuma iaitu RM1.2 bilion untuk membina Empangan Mengkuang	Projek Langat 2 berjumlah RM8 bilion akan ditanggung oleh rakyat Selangor melalui tarif air baru kerana kos itu termasuk di dalam bayaran pampasan tahunan
Kenaikan tarif air	Tidak diketahui	Tiada kenaikan dalam 3 tahun pertama, naik antara 12% - 16% setiap 3 tahun selepas itu

Komentar:

Kenaikan tariff air akan berlaku dalam tahun 2017 iaitu tahun pilihanraya umum.

KOS LANGAT 2

- Dalam taklimat oleh Menteri Besar dan Kerajaan Negeri, Menteri Besar tidak boleh memberikan jawapan yang berterus terang mengenai apa kuasa yang ada kepada wakil Kerajaan Selangor yang dilantik menduduki JK Pelaksanaan Langat 2.

- Ketua Pegawai Eksekutif KPS, En Suhaimi hanya menyebut bahawa JK itu menasihati aspek teknikal supaya pembinaan itu menepati kehendak operator air yang baru.

Komentar:

Setakat ini, Projek Langat 2 nampaknya akan dikawal sepenuhnya oleh Kerajaan Persekutuan selain dari tugas menasihati secara teknikal seperti yang disebut di dalam mesyuarat.

Ini bermakna bukan sahaja kontrak akan dianugerahkan kepada kroni, jumlahnya akan mempunyai kesan yang besar kepada tarif air di masa hadapan di Selangor, kerana kos Langat 2 akan ditanggung oleh rakyat Selangor.