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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:	:	Chapter 11
ARCAPITA BANK B.S.C.(C), et al.,	:	Case No. 12-11076 (SHL)
Reorganized Debtors.[1]	:	Confirmed

OMNIBUS REPLY TO CERTAIN RESPONSES TO SECOND OMNIBUS OBJECTION TO CLAIMS

The above-captioned Reorganized Debtors file the following omnibus reply (the "Reply") to certain responses (the "Responses") to the Second Omnibus Objection to Claims [Docket No. 1050] (the "Second Omnibus Objection")[2] filed by the Reorganized Debtors' predecessors in interest (the "Debtors"):

BACKGROUND

1. On April 26, 2013, the Debtors filed the Second Omnibus Objection, whereby they objected to certain proofs of claim filed in these cases (the "Disputed Claims"). Among

[1] The chapter 11 case captioned In re Falcon Gas Storage Company, Inc., No. 12-11790 (Bankr. S.D.N.Y.), is being administered jointly with the other above-captioned cases, but no plan has been confirmed in that case.

[2] Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Second Omnibus Objection.

others, the holders of Disputed Claims Nos. 45, 236, 255 and 517 filed timely Responses to the Second Omnibus Objection, which, as of the date hereof, have not been resolved by the parties.

2. In the Second Omnibus Objection, the Debtors objected to certain "Investment Account Claims" filed by third-party investors on account of their Unrestricted Investment Accounts ("URIAs") maintained for them in the ordinary course of business by Arcapita Bank B.S.C.(c) (the "Bank"). Second Omnibus Objection ¶ 13. As described in the Second Omnibus Objection, initially, pending their investment, all investor funds were commingled in a *mudaraba* account (the "*Mudaraba* Account"). Id. ¶ 14. Upon the investment of the funds by the Bank (which had a high level of discretion over these investments), the appropriate portion of the investor's interest in the *Mudaraba* Account would be converted into the corresponding equity interest in either a Debtor or a Debtor's affiliate, and subsequent proceeds resulting from the investment (the "Deal Proceeds") would be credited to the investor's URIA and invested in the *Mudaraba* Account until the investor either reinvested the funds, or received a cash distribution from the URIA. Id. Some investors withdrew the Deal Proceeds immediately, while others kept them in a URIA for extended periods of time. Id.

3. In the Second Omnibus Objection, the Debtors objected to the Investment Account Claims on several grounds, including the following: (i) the balance in the investor's URIA as of March 18, 2012, as reflected in the Debtors' books and records, did not correspond to the amount or priority asserted (the "Books & Records Claims"), and (ii) the claimants sought recovery for amounts that had previously been converted to equity interests in one of the Debtors' affiliates (the "Equity Interest Claims"), which were unaffected by the commencement of the Debtors' chapter 11 cases.

4. In addition, in the Second Omnibus Objection, the Debtors objected to the "Financial Institution Claims," asserted by financial institutions that were, as of the Petition

Date, parties to various financial arrangements with the Debtors. Some of the Financial Institution Claims were objected to as Books & Records Claims, and with respect to others, the Debtors provided more fulsome analysis.

OMNIBUS REPLY

Claim No. 236

5. The Debtors objected to claim no. 236 filed by Combined National Industries Holding Co. for Energy (K.S.C.) Holding ("CNI") and sought to disallow it in its entirety on the basis that it was an Equity Interest Claim, and, as a holder of an equity interest in a non-Debtor company, CNI was not properly a creditor of any of the Debtors and had no right to assert a claim against any of them. See Schedule 1 to Second Omnibus Objection.

6. In CNI's Response [Docket No. 1328], CNI has acknowledged that its claim is based on a $75.6 million investment, pursuant to a share purchase agreement, in Arcapita GCC Utilities Development ("AGUD I"), an SPV registered in the Cayman Islands, that, in turn, invested in a portfolio of joint venture projects that were developing various utility services projects in the Gulf region. CNI Response p. 3. In its Response, CNI cites to a letter apparently sent by the Debtors to the AGUD I investors on September 12, 2012 (*i.e.*, postpetition), informing them of the status of their investment. In that letter, the Debtors have informed CNI that, while $207.6 million has been invested in three portfolio companies, $76.1 million was still kept in a cash deposit at the Bank. Based on this information, CNI asserts that at least $16.7 million out of the originally claimed $75.6 million (*i.e.*, its *pro rata* share of the funds in the cash bank account) represents a legitimate claim, rather than an equity interest (the "Cash Claim"). Id.

7. As set forth in the Affidavit of Samuel E. Star (the "Star Affidavit") attached hereto as Exhibit A, as of March 18, 2012, the cash balance in CNI's URIA was $0. See Star

Aff. ¶ 7. As to the Cash Claim, it is properly a claim against District Cooling Capital Limited, a deal company in which CNI and the other AGUD I investors have invested, which is not a Debtor. CNI's investment in District Cooling Capital Limited is confirmed by the investment statement dated as of March 18, 2012. The Bank has scheduled an undisputed claim for District Cooling Capital Limited, which indirectly encompasses CNI's Cash Claim. See Star Aff. ¶ 8.

Claim No. 517

8. Claim no. 517 filed by Al Imtiaz Investment Co. (K.S.C.) ("Al Imtiaz") was objected to as an Equity Interest Claim. See Schedule 1 to Second Omnibus Objection.

9. In its Response [Docket No. 1591], Al Imtiaz asserts that its claim is not based on an equity interest, but is for Deal Proceeds. Specifically, Al Imtiaz claims that is entitled to $1,336,633 as its share of the exit proceeds realized by a non-Debtor, Arcapita Ventures I Limited ("Arcapita Ventures") from the sale of its interests in Prenova, Inc. ("Prenova").

10. As stated in the Star Affidavit, as of the Petition Date, Al Imtiaz's $1,336,633 in Deal Proceeds from the Prenova sale had not yet been transferred to Al Imtiaz's URIA. See Star Aff. ¶ 9. The Bank has scheduled an undisputed claim for Arcapita Ventures that indirectly encompasses Al Imtiaz's claim for these Deal Proceeds. See id. Accordingly, claim no. 517 should be disallowed as requested in the Second Omnibus Objection.

Claim No. 45

11. Claim no. 45 was filed by the National Bank of Bahrain BSC ("NBB") against the Debtor Arcapita Investment Holdings Limited ("AIHL") on account of a certain Promise to Sell Shares Agreement dated December 15, 2009 (the "SPA"). Claim no. 45 was objected to by the Debtors because the call option for the shares of AIHL's non-Debtor subsidiary, Waterwarf Holdings Ltd. ("Waterwarf") provided to NBB under the SPA remained unexercised as of the Petition Date and, thus, the Debtors maintained, did not result in a valid claim against AIHL.

Second Omnibus Objection ¶ 42. Additionally, the Debtors argued that NBB has not suffered a loss: because the option is "out-of-the-money," NBB could never have realized a gain upon exercising it. Id. ¶ 43.

12. In its Response [Docket No. 1315], NBB has asserted that (i) in addition to the right to acquire the Waterwarf shares, the SPA gave NBB the right to elect to receive payment, thereby creating a claim cognizable under the Bankruptcy Code, (ii) NBB's right to acquire the Waterwarf shares constitutes a "claim" to AIHL's property, and (iii) alternatively, to the extent the Court finds that what NBB has is an equitable right not entitled to a payment, it should not be considered a "claim" under the Bankruptcy Code, and NBB is asking the Court to hold that this obligation not be subject to either the automatic stay or discharge and remain enforceable against reorganized AIHL. NBB Response ¶¶ 13-18. None of these arguments changes the fact that the Debtors are entitled to the relief they sought in the Second Omnibus Objection.

13. First, NBB argues that paragraph 4.2.2. of the SPA gives it the right to elect to receive payment as an alternative remedy. In fact, paragraph 4.2.2. of the SPA provides that NBB "may, at its sole discretion, elect to deduct or set off from the Purchase Price [of the Waterwarf shares] any amounts due by Arcapita Bank B.S.C.(c) to [NBB]." Id. ¶ 16. Therefore, NBB contends that it suffered a loss due to its inability to substantially reduce its credit exposure to the Bank by exercising its setoff right. Id.

14. In fact, NBB has suffered no loss because its alleged setoff right under paragraph 4.2.2. of the SPA would not have been enforceable under section 553(a) of the Bankruptcy Code. Section 553(a) requires that obligations to be set off be "mutual," *i.e.*, be "between the same parties, standing in the same capacity." See Lines v Bank of Am. Nat'l Trust & Sav. Ass'n, 743 F. Supp. 176, 183 (S.D.N.Y. 1990). Under the SPA, NBB has an obligation, upon the exercise of its option, to pay the purchase price to AIHL; however, it seeks the right of setoff against

amounts owed to it by the Bank. Thus, it is basing its claim on an alleged right to a "triangular setoff," which is not enforceable under section 553(a). See, e.g., In re Lehman Bros., 458 B.R. 134, 141 (Bankr. S.D.N.Y. 2011) (stating that "triangular setoff is not (and never was) permitted under the Bankruptcy Code"); In re SemCrude, L.P., 399 B.R. 388, 392-93 (Bankr. D. Del. 2009) (finding that "section 553 of the Code prohibits a triangular setoff of debts against one or more debtors in bankruptcy as a matter of law due to lack of mutuality"), aff'd, 428 B.R. 590 (D. Del. 2010). Nor is there an exception to the mutuality requirement based on private agreement between parties. See Lehman Bros., 458 B.R. at 141 (agreeing with the SemCrude court that "a right to triangular setoff set forth in a contract does not create mutuality for purposes of section 553, and that there is no contract exception to section 553").

15. Second, under section 510(b) of the Bankruptcy Code, NBB's "claim" against AIHL, to the extent it exists, has the same priority as the Waterwarf shares, and "shares of a subsidiary create ***no interest in the assets of the parent***." In re Nat'l Farm Fin. Corp., 2008 WL 410236 *4, fn. 3 (Bankr. N.D. Cal. Feb. 12, 2008) (emphasis added). In fact, courts have expressly held that a damage claim asserted against a debtor concerning a security of the debtor's affiliate must be subordinated to all claims against the ***debtor***. See, e.g., In re VF Brands, Inc., 275 B.R. 725, 727 (Bankr. D. Del. 2002) (stating that "generally shareholders of a subsidiary have no claim against the parent," and holding that where a claim is asserted for damages stemming from purchase of shares of the debtor's subsidiary, under section 510(b), such claim is subordinated to all claims against the parent); see also In re Del Biaggio, III, 2012 WL 5467754, *5 (Bankr. N.D. Cal. Nov. 8, 2012 (same); Lernout & Hauspie Speech Prods., N.V. v. Baker (In re Lernout & Hauspie Speech Prods., N.V.), 264 B.R. 336 (Bankr. D. Del. 2001) (same).

16. Third, to the extent NBB is seeking a declaratory judgment with respect to its right to an equitable remedy, its request is procedurally improper. Pursuant to Rule 7001 of the

Federal Rules of Bankruptcy Procedure, a request for a declaratory judgment constitutes an adversary proceeding. See Fed. R. Bankr. P. 7001(9). Accordingly, NBB is not allowed to seek declaratory relief, except by filing a complaint. See Fed. R. Bankr. P. 7004.

Claim No. 255

17. Claim no. 255 was filed by Al Baraka Bank Tunisia ("Al Baraka") as a secured claim, and was objected to as a Books & Records Claim. The Debtors have asserted that Al Baraka's claim to secured status was not supported by any documentation. Second Omnibus Objection ¶ 48.

18. Claim no. 255 arose under a *murabaha* agreement between Al Baraka and the Bank dated May 17, 2006 (the "Al Baraka Agreement"), pursuant to which: (i) the Bank would purchase an agreed-upon amount of commodities on behalf of Al Baraka, (ii) Al Baraka would then sell those commodities to the Bank, and (iii) the Bank would pay to Al Baraka an amount equal to the purchase price of the commodities plus an agreed-upon profit at a stated maturity date.

19. Al Baraka has alleged that its claim is secured either by (i) the commodities involved in these transactions, or (ii) a setoff right with respect to any of the Debtors' cash held by Al Baraka or any of its affiliates. Second Omnibus Objection ¶ 50. The Debtors disagreed with both allegations, and asserted that (i) the relevant documentation evidences a straightforward purchase and sale transactions and contains no language indicating a grant of a security interest (id. ¶ 51), and (ii) they are not aware of any cash held by Al Baraka that is subject to setoff, nor has Al Baraka offered any evidence to the contrary. Id. ¶ 52.

20. In its Response [Docket No. 1319], Al Baraka argues that the objection should be overruled because (i) the Debtors' stated rationale for disallowance (*i.e.*, that Al Baraka's claim should be reclassified) falls outside the categories permitted to be subject to an omnibus

objection under Bankruptcy Rule 3007(d), (ii) Al Baraka's claim is secured pursuant to *shari'ah* law, (iii) at a minimum, Al Baraka has an equitable lien or a constructive trust with respect to the commodities involved or their proceeds, and (iv) the Debtors' cash with respect to which Al Baraka asserts a setoff right is $5 million held by Al Baraka Bank Bahrain ("ABB"). Al Baraka Response ¶¶ 8-13.

21. First, in asserting that the Debtors were not authorized to object to Al Baraka's claim through an omnibus claims objection, Al Baraka ignores the explicit provisions of the Court's order approving claim objection procedures in these cases [Docket No. 785] (the "Claim Objection Procedures Order"). The Claim Objection Procedures Order specifically provides that "the Debtors . . . , in addition to those grounds set forth in Bankruptcy Rule 3007(d), are authorized to file Omnibus Objections to claims seeking reduction, reclassification or disallowance of claims on," among others, the ground that "the claims were incorrectly classified." Claim Objection Procedures Order ¶ 3(b). Accordingly, the Debtors' objection to Al Baraka's claim on the basis that is was improperly filed as a secured claim was entirely proper.

22. Second, while Al Baraka asserts that the secured status of its claim, as well as its alleged entitlement to an equitable remedy, arise under *shari'ah* law, it has failed to provide ***any*** evidence whatsoever as to (i) the exact precepts of the *shari'ah* law it is relying on, (ii) the basis of its relevance, or (iii) the application of such precepts to the facts at hand. See, e.g., Strauss v. Credit Lyonnais, S.A., 242 F.R.D. 199, 207 (E.D.N.Y. 2007) (discussing requirements with respect to presenting arguments under foreign law in discovery context); Alfadda v. Fenn, 149 F.R.D. 28, 34 (S.D.N.Y. 1993) (same).

23. Where an objection to a proof of claim is interposed that refutes at least one of the claim's essential elements, the claimant bears the burden to demonstrate by a preponderance of the evidence the validity of the claim. See In re Oneida Ltd., 400 B.R. 384, 389 (Bankr.

S.D.N.Y. 2009); In re Rockefeller Ctr. Props., 272 B.R. 524, 539 (Bankr. S.D.N.Y. 2000). Al Baraka has failed to offer ***any*** evidence of a security interest in the Debtors' property under any law, as is its burden. Because of Al Baraka's failure to satisfy its burden, the Debtors' objection must be sustained. See Hasson v. Motors Liquidation Co. GUC Trust (In re Motors Liquidation Co.), 2012 WL 1886755, *3 (S.D.N.Y. May 21, 2012) (to have a claim allowed following objection that refutes proof of claim's *prima facie* validity, claimant must meet the "preponderance of the evidence" burden of proof).

24. In addition, as Al Baraka concedes, the Al Baraka Agreement is explicitly governed by English law, albeit to the extent such law does not conflict with the principles of *shari'ah*. Al Baraka Response ¶ 9; Al Baraka Agreement § 12. Such caveat, however, does not alter the clear contractual provision that English law is the governing law. See, e.g., Shamil Bank of Bahrain v Beximco Pharm. Ltd., [2003] EWHC 2118 (Comm.), 2 All E.R. (Comm.) 849 (Eng.), aff'd [2004] ECWA (Civ) 19, 1 W.L.R. 1784 (Eng.), attached hereto as Exhibit B. In that case, the English court rejected the argument that the choice of law clause stating that an agreement was governed by English law "subject to the principles of Glorious Sharia'a" would "require the court to determine what Sharia'a law was" or changed the fact that the agreement was controlled by English law. Id. at 787. As this Court has previously pointed out, the principles of *Sharia'a* are "far from settled and [are] subject of considerable disagreement among clerics and scholars," thus making this Court "woefully inadequate" "to make any pronouncements of Sharia compliance based on Islamic religion and orthodoxy." Hr'g Tr. 42:24-43:1 (June 24, 2013) [Docket No. 1327]; see also Shamil Bank of Bahrain ("The English court, as a secular court, is not suited to ascertain and determine highly controversial principles of a religious based law and it is unlikely that the parties would be satisfied by any such ruling…").

25. Third, and similarly, Al Baraka fails to establish that it is entitled to a constructive trust over or an equitable lien on the commodities or the proceeds allegedly held by the Bank. While Al Baraka claims that it is entitled to an equitable lien under "Sharia'a standards," it fails to explain what such standards are or how they are applicable to its claim, thus yet again failing to carry its burden of proof. See In re Motors Liquidation Co., 2012 WL 1886755 at *3.

26. As to Al Baraka's assertion that it is entitled to a constructive trust or equitable lien under New York law, it is incorrect. As discussed in the Second Circuit precedent cited by Al Baraka itself, the four elements that must be established for a constructive trust to be imposed under New York law are as follows: "(1) a confidential or fiduciary relationship; (2) a promise, express or implied; (3) a transfer of the subject *res* made in reliance on that promise; and (4) unjust enrichment." Superintendent of Ins. v. Ochs (In re First Cen. Fin. Corp.), 377 F.3d 209, 212 (2d Cir. 2004) (citations omitted).[3] Of these four elements, the fourth is the most important since "the purpose of the constructive trust is prevention of unjust enrichment." Id. (internal citations omitted).

27. And it is this "most important" element of the constructive trust remedy, in and of itself, that dooms Al Baraka's claim: according to the Second Circuit (relying on the New York Court of Appeals), "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in *quasi* contract for events arising out of the same subject matter." Id. at 213 (finding that "the existence of a written agreement precludes a finding of unjust enrichment" and, thus, of the imposition of constructive trust) (citing Clark-Fitzpatrick, Inc. v. Long Island R.R. Co., 70 N.Y.2d 382 (1987)). See also Tekinsight.com, Inc.

[3] As Al Baraka points out, the elements for proving entitlement to an equitable lien are "substantively similar to a constructive trust," with the only distinction being "that the beneficiary of a constructive trust receives complete title to the asset whereas the holder of an equitable lien receives only a lien on the asset through which it can satisfy a money claim." Al Baraka Response ¶ 10.

v. Stylesite Mktg., Inc. (In re Stylesite Mktg., Inc.), 253 B.R. 503, 507-08 (Bankr. S.D.N.Y. 2000) (holding that existence of a "valid contract . . . bars imposition of a constructive trust" because "quasi-contractual claims such as unjust enrichment are not permitted if a written contract between the parties governs the subject matter of their dispute"). Al Baraka's claim is based, by its own assertion, on the Al Baraka Agreement, which, as Al Baraka no doubt would agree, is "a valid and enforceable written contract."

28. In addition, although a showing of actual fraud or wrongful conduct is not strictly required for the imposition of a constructive trust, New York law is clear that a constructive trust is an equitable remedy that is "fraud-rectifying" rather than "intent-enforcing." First Cen. Fin. Corp., 377 F.3d at 216. Al Baraka has not alleged, nor could it, fraud or other misconduct on behalf of the Bank, thus making the equitable remedy of constructive trust inappropriate here.

29. Finally, the Second Circuit has also cautioned that, in a bankruptcy case, courts should "proceed with caution" when determining whether to impose constructive trust at the risk of wreaking "havoc with the priority system ordained by the Bankruptcy Code." Id. at 217 (internal citations omitted). As the Second Circuit and numerous other court have noted, "the equities of bankruptcy are not the equities of common law." Id. at 218 (internal citations omitted). While in a typical non-bankruptcy case, constructive trust may prevent one who committed fraud or is guilty of misconduct from becoming unjustly enriched, in a bankruptcy case, the estate's assets are being marshaled and distributed to the debtor's creditors under the court's supervision and in accordance with federal law, all of which ensures that no unjust enrichment of the debtor occurs. Id. That is yet another reason that no constructive trust or another equitable remedy is appropriate here.

30. Fourth, on information and belief, Al Baraka and ABB are two distinct legal entities. Al Baraka has presented no evidence to the contrary. Accordingly, for the reasons set

forth in paragraph 14 above, Al Baraka does not have a setoff right with respect to any funds that may be held by ABB.[4]

CONCLUSION

31. For the reasons stated above, the Reorganized Debtors request that the Court (i) sustain the Second Omnibus Objection with respect to the claims discussed herein, and (ii) grant such other relief as is appropriate under the circumstances.

Dated: New York, New York
November 7, 2013

MILBANK, TWEED, HADLEY & McCLOY LLP

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[4] In fact, had Al Baraka and ABB been the same entity, the Debtors may have had an additional ground for objection to claim no. 255, namely section 502(d) of the Bankruptcy Code, as there may exist an avoidance action against ABB.

Exhibit A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
ARCAPITA BANK B.S.C.(c), et al.,	:	Case No. 12-11076 (SHL)
Reorganized Debtors.[1]	:	Confirmed

AFFIDAVIT OF SAMUEL E. STAR IN SUPPORT OF OMNIBUS REPLY TO CERTAIN RESPONSES TO SECOND OMNIBUS OBJECTION TO CLAIMS

Pursuant to 28 U.S.C. § 1746, I, Samuel E. Star, hereby declare:

1. I am a Senior Managing Director at FTI Consulting, Inc. ("FTI"), the financial advisor for the above-captioned Reorganized Debtors.

2. In my capacity as Senior Managing Director of FTI, I am authorized to submit this affidavit (the "Affidavit") in support of the *Omnibus Reply to Certain Responses to Second Omnibus Objection to Claims* (the "Reply").[2]

3. Except as otherwise indicated, all facts set forth in this Affidavit are based upon: (a) my personal knowledge; (b) my review, or the review of FTI employees under my supervision and direction, of the relevant documents, including the Schedules and the Reply and each claim discussed therein as part of the claims reconciliation process in these chapter 11 cases; and (c) information supplied to me by others at the request of the Reorganized Debtors or

[1] The chapter 11 case captioned In re Falcon Gas Storage Company, Inc., No. 12-11790 (Bankr. S.D.N.Y.) is being administered jointly with the other above-captioned cases, but no plan has been confirmed in such case.

[2] Capitalized terms used herein but not otherwise defined shall have the meaning ascribed to such terms in the Reply.

their professionals. If called upon to testify, I could and would competently testify to the facts set forth herein.

QUALIFICATIONS AND BACKGROUND

4. I have extensive experience with chapter 11 cases and other distressed restructurings, having advised debtors and creditors in the chapter 11 process for approximately 25 years. I joined FTI in 2004 and am familiar with all aspects of bankruptcy case administration, including, among other things, claims review and reconciliation, and preparation of statements and schedules.

5. I received my Bachelor of Science degree in Accounting from State University of New York at Albany. My business address is 3 Times Square 10th Floor, New York, NY 10036.

CLAIM NOS. 236 and 517

6. In connection with the Reply, my staff or I have examined proofs of claim nos. 236 and 517, all supporting documentation filed therewith and with the respective Responses, as well as the Debtors' books and records, including the relevant investment and URIA statements.

7. With respect to claim no. 236, based on the foregoing, and specifically on the review of a statement of transactions relating to CNI's URIA as of March 18, 2012, the cash balance in CNI's URIA was $0.00.

8. Furthermore, the $16.7 million Cash Claim asserted by CNI is properly a claim against District Cooling Capital Limited, a deal company in which CNI and the other AGUD I investors have invested, which is not a Debtor. CNI's investment in District Cooling Capital Limited is confirmed by the investment statement dated as of March 18, 2012. The Bank has scheduled an undisputed claim for District Cooling Capital Limited, which indirectly encompasses CNI's Cash Claim.

9. With respect to claim no. 517, based on FTI's review of a statement of transactions relating to Al Imtiaz's URIA as of March 18, 2012, Al Imtiaz's Deal Proceeds from the Prenova sale in the amount of $1,336,633 had not been transferred to Al Imtiaz's URIA as of the Petition Date. The Bank has scheduled an undisputed claim for Arcapita Ventures, which indirectly encompasses Al Imtiaz's Deal Proceeds claim.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: November 7, 2013
New York, New York

/s/ Samuel E. Star
Samuel E. Star

Exhibit B

Shamil Bank of Bahrain v Beximco Pharmaceuticals Limited and Others

2002 Folio No 1172

High Court of Justice Queen's Bench Division Commercial Court

1 August 2003

Neutral Citation Number [2003] EWHC 2118 (Comm)

2003 WL 22187542

Before: Mr Justice Morison

Friday 1st August 2003

Representation

Ms Sara Partington (instructed by Norton Rose) appeared on behalf of the Claimant.

Mr Richard Hacker QC (instructed by Jaswal Johnston) appeared on behalf of the Defendants,.

APPROVED JUDGMENT

MR JUSTICE MORISON:

1. This is an application for summary judgment by the claimants, the Shamil Bank of Bahrain EC (the bank). The bank is incorporated under the laws of Bahrain and is authorised to act as such by the relevant authority; namely the Bahrain Monetary Agency. It operates in accordance with the principles of Sharia'a law as an Islamic financial institution. Its commercial activities are supervised by its religious supervisory board to ensure that they are conducted in accordance with the Sharia'a principles. The board comprises distinguished Islamic scholars from Egypt, Turkey, Saudi Arabia and Bahrain.

2. It is not in dispute that the board has certified the activities of the bank, which include the transactions giving rise to the present dispute, to be in compliance with Sharia'a law. Nor was it suggested, until the defence was filed in this action, that the defendants were dissatisfied, on religious grounds, with the arrangements agreed between the parties.

3. The first two defendants are companies incorporated in Bangladesh involved in the manufacture of pharmaceuticals and in export and import trade, respectively. The third and fourth defendants are directors of the first two defendants and of the fifth defendant, which is the parent of the first two.

4. The transactions between the parties may be summarised in this way. After some negotiations, in 1995 the bank and the first two defendants entered into a Morabaha Financing Agreement. The structure of the agreement was that the bank were described as the seller and the first defendant the buyer. The second defendant was appointed by the bank as its agent “for the purchase of the goods” by the bank. The first defendant agreed to buy the goods from the bank and to pay the bank the Morabaha price. The price included a profit element.

5. Effectively, the bank were advancing funds to the defendants and repayments including profit were to be made over a period. The parties conferred on this court, jurisdiction over any legal action or proceedings “arising out of or in connection with this agreement” and the parties' choice of law was expressed in this way:

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

6. On the same date, 28th December 1995, the parties separately agreed an agency contract between the bank and the second defendants which identified the bank's contribution towards the costs of the goods to be purchased as US $15 million.

7. A payment schedule forming part of the Morabaha Agreement was also agreed which identified the number of instalments and their amounts. Repayment was to commence on 28th March 1996 and the last payment of US $15,323,322 was due on 28th December 1997 making a total repayment of US $17,586,583 million.

8. Also on the same date, the parties entered into a market rate agreement.

9. On 3rd January 1996, the claimants paid the second defendants 15 million and, in accordance with the Morabaha Agreement and the schedule of repayments, the first defendant paid 7 instalments each of US $323,323 leaving only the payment of the last instalment.

10. The parties entered into a second Morabaha Agreement whereby the bank extended a further facility of US $15 million to the second defendant. Its terms, and the repayment terms, were essentially the same, However, the first four instalments were of relatively small amounts between US $367,500 and US $375,667. The fifth, sixth and seventh instalments were somewhat larger: about US $2.8 million each and the last payment was 7.6 million odd making a total repayment of US $17,609,932. Between 15th October and 12th August 1997, the second defendants paid the four smaller instalments.

11. Admittedly, the first two defendants defaulted on the agreements and, following discussions, they entered into new arrangements, which I shall call the "exchange agreements". These agreements, which were entered into on 14th September 1999, were amended on two separate occasions: first on 4th February 2001 and again on 30th January 2002. The original exchange agreement, dated 14th September 1999, recited that there was owing to the bank, under the first Morabaha Agreement, an outstanding amount of US $15.323,323 million together with "accrued compensation" for failure to pay sums on their due dates. The substance of the new agreement was that the personal and corporate guarantors were released, from their obligations and the bank would discharge the outstanding amount in consideration of the first and second defendants transferring to the bank certain identified assets which, subject to conditions, the defendants would be entitled to use until 31st December 2002. For their use of the assets, the companies were required to pay a user fee. The guarantors were to enter into new personal guarantees. There was an identical governing law clause, to that in the Morabaha Agreements; the parties to the original exchange agreement were simply the bank and the first and second defendants.

12. On 4th February 2001, what was described as a supplemental agreement was made between all the parties to this action and an entity called New Dhaka Industries Limited, another Bangladesh company. This agreement also recited that the changes were being made at the request of the first and second defendants. The new agreement provided for the giving of personal guarantees by the third and fourth defendants and their guarantees, entered into on 6th February 2001, obliged them to pay all monies and discharge all obligations and liabilities now or hereafter due, owing or incurred by, the first and/or second defendants.

13. The guarantee contained a law and jurisdiction clause:

> "This guarantee is governed by and shall be construed in accordance with English law."

The guarantors irrevocably and unconditionally submitted to the jurisdiction of the English courts, although the bank were also free to take proceedings against them in any one or more other jurisdictions. On the same day, the fifth defendant entered into a guarantee in the same terms.

14. The bank say that, as at the effective date, namely 4th April 2002, there were outstanding, under the two Morabaha Agreements, US $28,442,838 together with accrued compensation of US $3,031,710.52. Under the exchange agreement, the bank are regarded as having discharged the outstanding amount and there upon, the first and second defendants were obliged to commence payment of the instalments of the user fees. The total amount of the user fee was US $46.860 million. Because the user fee was not paid, the bank exercised their right to accelerate the repayment of all user fees (see the letters of default referred to in paragraphs 8.1 and 8.2 of the points of claim). As at the date of the proceedings, the defendants owe them $49,711,710.52 million plus such compensation 'as the court may determine for such periods as it thinks fit.'. To the letters of demand,

there was no response and the proceedings were commenced in this court on 8th November 2002.

15. The amounts being claimed, as such, are not in dispute but the defences which have been advanced are as follows:

(1) Because of the wording of the governing law clause, that is:

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

the obligations are only enforceable if they are enforceable both under Sharia'a law and under English law. Because the agreements provide for the payment of "interest" or "Riba" they are not enforceable under Sharia'a law. Whilst the defendants accept that they received the advances, neither party:

"was under any illusion as to the commercial realities of the transactions".

The loan was "dressed up" as a Morabaha sales or Ijarah leases. They were merely "a disguise for an otherwise undocumented interest bearing loan". They say that both the accrued compensation payments and the rolling over process involved in the exchange agreements offended Sharia'a law, as did the acceleration of payments provided for under the exchange agreements.

(2) Regrettably, the defendants say, the loans could not be repaid and more time had to be sought from the bank. The exchange agreements were designed to ensure that the repayments could be achieved in accordance with the defendants' cash flow position, but they were unable to meet the schedules; and thus an oral agreement was made, under which the bank agreed to stay their hand and agreed that the debt would be suspended, until the parties had agreed upon a restructuring of the debt. As yet, no such agreement had been arrived at and thus the debt cannot be called in, as it is not due for repayment.

(3) The bank is estopped from claiming the monies because it represented that it would not seek to recover them until the defendants had agreed the restructuring of the debts.

(4) The guarantees are not enforceable because the bank had no capacity to enter into them, under Bahrain law, which applies to determine the capacity of the bank to enter into such a transaction, as that is the law of the place of its incorporation.

(5) They were also not enforceable because the guarantees are void for mutual mistake. The guarantees were executed at a time between the first variation to the exchange agreement and the second and final variation. The effect of these variations was to postpone the date on which the bank became liable to discharge the borrowers' "outstanding obligation to pay the outstanding amount under the 1995 and 1996 agreements". Accordingly, the guarantees were given at a time when both parties believed that very substantial sums remained due, under the 1995 and 1996 Morabaha and market rate agreements. Those agreements were void and unenforceable under the Sharia'a principles. Both parties were unaware of that fact when the guarantees were executed. There was no commercial rationale for the guarantees (which recorded as the consideration the promise by the bank to discharge the outstanding amounts due under the 1995 and 1996 agreements) if no such amounts were due. If the bank seeks to rely on a clause in the guarantee whereby the guarantors assume primary responsibility, in the event that any obligation of the bank were unenforceable for any reason, this would constitute "a disguised attempt, indirectly, to enforce obligations which are tainted by unlawfulness under their proper law".

16. This is not the occasion for a mini trial. Either the defences are credible or they are not. I am not obliged to accept the truth of everything put before me, but there is a blurred line between my being sceptical about the truth of what I am told at this stage and being persuaded that what I am told can be categorised as improbable or fanciful.

17. In the most general terms, the defences have all the hallmarks of being trumped up. There is no doubt that the bank advanced monies to the first two defendants and that these monies have not been repaid. No “religious” point was made until the defendants were sued. The concept of an oral agreement, which postpones the date for repayment until the parties reach a further agreement, which may be in the distant future, seems improbable in the extreme. Estoppel and mutual mistake are often the bed fellows of a well advised, desperate litigant who is scraping the barrel to avoid obligations.

18. The court's initial scepticism is enhanced by knowledge that the defendants are submitting that the:

> “Factual basis of certain of the defences raised (collateral agreement/promissory estoppel) substantiates the defendants' case that they do not have the means to make a payment of $28.4 million into court (whether within 14 days or at all)”.

19. But I must examine the defences with care because an instinctive approach to the issues is not sufficient or appropriate. I start with the point that is made that the claims asserted by the bank are unsustainable under Sharia'a law. The first question is whether the words “subject to the principles of Glorious Sharia'a” mean that in order to be enforceable, the agreements must both be valid under English law and under Sharia'a law, as the English court may find it to be. The claimants do not accept this proposition. One of the points they make is that there is no such thing as a recognised law of Sharia'a. A considerable amount of evidence has been adduced, from experts on either side, as to Sharia'a law and the lawfulness of the arrangements with the bank, under Sharia'a law, which I am told is the same as Islamic law.

20. The defendant's case on Sharia'a law is that:

> 1) Here, there is a coherent logical and credible explanation of why the fundamental claims asserted in this case are “unsustainable under Sharia'a law”.
>
> (2) The bank being incorporated in Bahrarn was established for the purpose of providing finance and banking services which are consistent with, and do not conflict with, Sharia'a law. The principles of Sharia'a law preclude the charging of Riba. More particularly, the principles of Morabaha Agreements are that the form of transaction is apt only to fund the purchase of specific goods and not for general working capital. In this case, the evidence shows that the monies were never intended to be used for the purpose of purchase of specific goods, to which the bank obtained title. Therefore, it is unenforceable and that this would be so whether or not the bank was aware of what the defendants were going to do with the money. Although they say, in this case, that the bank was well aware of the position. They say that the obligation to pay further accrued compensation, in the event of delayed payments under the Market Rate Agreement “plainly offend the principles of Sharia'a”. They further say that: in relation to the exchange agreements, these constitute loan agreements which appear, in form, to constitute a legitimate recognised and acceptable source of Islamic finance, namely ijarah or lease. However, in substance, these agreements do not achieve Sharia'a compliance because the bank did not take title, or the right of usufruct, to the goods purportedly leased. Secondly, they simply constitute a rolling over, or rescheduling, of the Morabaha arrangements themselves, not being in conformity with Sharia'a law.

21. The claimants say the bank's commercial activities are supervised by the religious supervisory board, to which I have made reference. They say that the role of the board is described in the bank's

memorandum and articles of association. Paragraphs 35 and 36 of the bank's Articles of Association. To be found in bundle 2 page 402.

> "The Religious Supervisory Board shall ascertain that the Company's investments and activities (and the activities of its subsidiary and affiliated companies) conform with the principles and provisions of Islamic Sharia'a. It shall, in particular, discuss with the members of the Board of Directors, managers of the Company or of any subsidiary or affiliated company under its control, such conformity and the business carried out by them and shall request any information it deems necessary. In particular, the Religious Supervisory Board shall adopt all the crucial decisions for applying the provisions of Islamic Sharia'a to ensure the realisation of the objects for which the Company was incorporated. Also, to ensure that the members of the Board of Directors, managers and employees are co-ordinating their activities according to such decisions which shall be binding upon all the shareholders. The Religious Supervisory Board shall within six months from the end of the Company's financial year, submit a written report stating that it fulfilled the obligations indicated herein and ascertained that the Company's investments and business activities (including its subsidiary companies) conform with the provisions of Islamic Sharia'a.
>
> The Religious Supervisory Board shall appoint — upon the nomination by the Chief Executive — a Sharia'a Supervisor who shall act as the Secretary of the Religious Supervisory Board. He need not be a member of the Religious Supervisory Board.
>
> The Board of Directors shall take the necessary actions to ensure that all the investments and other business transactions have been referred to the Religious Supervisory Board for approval before carrying out any other business transactions by the Company or by any subsidiary or affiliate company under its control."

(2.22 pm)

22. At the end of each year, the religious supervisory board certify that they are satisfied that the transactions of the bank are considered by the board to be in compliance with Sharia'a principles. The board, as I have indicated, compromises distinguished Islamic jurists from a variety of countries and the religious supervisory board is appointed by the bank's shareholders.

23 The claimants also say that the words "subject to the principles of Glorious Sharia'a" do not constitute a choice of law at all but are a reference to, or a reflection of, the fact that the bank seeks to conduct its affairs according to Sharia'a principles under the supervision of the board. They also say that even if Sharia'a law were to apply, then in accordance with the opinion of Dr Lau, their expert, the exchange agreements, under which these claims are made, are enforceable. They say, in any event, if they are wrong about all that, at least the capital that has been advanced by the bank is due and owing under the exchange agreements even if the compensation and other amounts on top are not.

24. They say that the words "Glorious Sharia'a principles" are a reference to religious principles rather than to a choice of a coherent system of law. There is, they submitted, the greatest controversy, as shown by the evidence, between experts and indeed between Islamic courts, as to the "true" principles. And, given that controversy, it is highly improbable that the parties intended an English court to determine difficult questions of the Sharia'a principles. As Dr Lau points out in his first expert report, Sharia'a law is made up of conflicting pronouncements and there is a considerable debate as to what is and what is not permissible under it. The situation is complicated by the fact that much of the classical law emerged at a time when many financial concepts simply did not exist. It is because of these systemic uncertainties and controversies that Islamic banks submit themselves to the supervision and scrutiny of religious supervisory boards.

25. It was submitted that this statement is supported, to an extent, by the fact that Mr Justice Khan's confident assertions, as to the principles of Sharia'a law, were overruled, effectively, by the Sharia'a appellant branch of the High Court of Pakistan which annulled his judgment in the Khaki case. It is also, they say, supported, to an extent, by Mr Justice Khan's report itself.

> "In the Sharia'a, there is no opinion of any person, body or jurist which binds a court which has to decide a Sharia'a issue. The dispute must be resolved by the court in the light of its' own view of the position under Sharia'a law."

26. These issues, says Mr Doctor on behalf of the claimants, are significantly not left to the ordinary civil courts to decide in Pakistan, which is attempting to Islamicise its banking and financial laws. Therefore, it is inconceivable, or perhaps just unlikely, that the parties in this case intended that the English secular court be entrusted with the task of deciding between opposing points of view which themselves may be based on geopolitical and particular religious beliefs. Each opposing jurist might be equally right. His opinion might be equally valid and sustainable. There is no guarantee that either party would be prepared to accept the ruling of an English secular court on this subject.

27. Mr Doctor also drew attention to article 3.1 of the Rome Convention which applies by virtue of article 1.1. Article 3 of the Convention provides:

> "A contract shall be governed by the law chosen by the parties. The choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case by their choice, the parties can select the law applicable to the whole or a part only of the contract."

In this case, it is clear that the parties chose English law to be the governing law of the agreement. Dicey and Morris note, at paragraph 32–079, that:

> "Article 1.1 of the Rome Convention makes it clear that the reference to the parties' choice of 'the law' to govern a contract is a reference to the law of a country. It does not sanction the choice or application of a non-national system of law, such as the lex mercatoria, or general principles of law."

Counsel also referred, in his written argument, to a passage in a book called: "The Conflict of Laws" by A Briggs, the 2002 edition, at page 159:

> "A choice of the lex mercatoria or the laws of mars, not being a law of a country, cannot be upheld because the convention sanctions only the choice of the law of a country and, in such a case, article 3 cannot apply."

Mr Doctor further submitted that the convention is binding on all who litigate in England, whether as claimant or defendant, and particularly it applies to those who have consented, as here, to the jurisdiction of the English courts. It is not possible to contract out of the Rome Convention. He went on to submit that this does not mean that the parties cannot incorporate, by agreement, special provisions that are suggested by, or consonant with, religious or other moral principles. But they cannot require, he submitted, the English court to adjudicate their contractual disputes according to such principles independently of the national law which is otherwise, by operation of the Rome Convention, binding on the parties to the contract.

28. In any event, the Rome Convention will not permit a situation where two laws simultaneously govern the question of the enforceability of a contract. It is true that the Rome Convention allows for the splitting of a contract so that parts of it can be governed by different laws (see the wording of article 3.1). Dicey and Morris describe the concept of, and the application of, different laws as follows:

> "The concept of depecage (or dismemberment) is used in two distinct ways in the conflict of laws. The first expresses the idea that not all issues arising out of the contractual relations will necessarily be governed by the same law: thus, while the law chosen by the parties may govern the validity of the contract, matters of form may be governed by the place of contracting, matters of capacity by the personal law and so on. The second expresses the thought that different laws may apply to different parts of the contract. The parties may stipulate (or the courts may hold) that one obligation is governed by the law of state A and another is governed by the law of state B."

But depecage does not sanction the application of different systems of law to the same issue. There is a further quotation from Dicey and Morris:

> "There is no objection in principle to different parts of the contract being subject to different laws for the purpose, for example, of interpretation: it is in theory possible (although in practice inconvenient and inevitably rare) for one part of a contract to be

> construed in accordance with the principles of English law and for another part to be construed in accordance with the principles of French law. But there is an objection in principle to what has been called 'the general obligation' of a contract being governed by more than one law. Even if different parts of a contract are said to be governed by different laws, it would be highly inconvenient, and contrary to principle, for such issues as whether the contract is discharged by frustration or whether the innocent party may terminate or withhold performance on account of the other party's breach,' not to be governed by a single law.

(2.35 pm)

29. Mr Doctor refers to the report of Giuliano and Lagardes at paragraph 59 of the claimant's written skeleton argument.

> "Nevertheless when the contract is severable the choice must be logically consistent, ie it must relate to elements in the contract which can be governed by different laws without giving rise to contradictions. For example, an 'index-linking clause' may be made subject to a different law; on the other hand it is unlikely that repudiation of the contract for non-performance would be subjected to two different laws, one for the vendor, and the other for the purchaser. Recourse must be had to Article 4 of the Convention if the chosen laws cannot be logically reconciled."

30. It is common ground by concession that there cannot be two governing laws and reference at this point should be made to the case of American Motorists' Insurance Company v Cellstar Corporation and Another (2003) EWCA civil 206, at paragraph 32.

31. Mr Doctor made detailed submissions relating to the other two points made on Sharia'a law by the defendants, namely, that if Sharia'a law applied, the agreements did not offend it and the capital sums would, in any event, by repayable under the agreements.

32. In my view, if the court were to be concerned with the application of Sharia'a law and its impact on the lawfulness of the agreements, I would conclude at this stage that it was arguable which of the two parties' experts is right and that it would offend the principles underlying part 24 to seek to resolve them before a trial.

33. The same applies to the second argument, namely the repayablity of the capital sums. Whilst there are passages in Mr Justice Khan's report which suggest that an agreement which is in conflict with Sharia'a principles will not disentitle the lender to recover at least the principal sums advanced, this issue would also require further examination. There is, at present, no quasi contractual claim (for money had and received) or unjust enrichment and there is a sufficiently arguable case as to whether under a contract which (in the event) is held to conflict with Sharia'a law, there can be recovery of any sum at all.

34. And so I turn to the question of whether the defendants can show an arguable case that the words "subject to the principles of Glorious Sharia'a" in the context of the clause as a whole, and against the background to which I made reference, would require the court to determine what Sharia'a law was, in the relevant respects, and if not lawful by Sharia'a law but lawful under English law to conclude that the claims are unenforceable.

35. In my view, Mr Doctor is right on this issue largely for the reason which he advances in support of his argument, to which I have made extensive reference. Although Mr Hacker denies it, the case he advances amounts, I think, to a retreat from his concession, inevitably and rightly made, that there cannot be two governing laws. Effectively, he is saying that English law will not determine the enforceability of the agreement; that is an issue for Sharia'a law or for Sharia'a law as well. Mr Hacker sought to liken the clause to a clause which incorporates matters such as the Hague Rules. Of course, a contract governed by English law may incorporate rules such as those, but clear words would need to be used to produce the startling result for which he contends. At one stage, he submitted that the parties intended to subject the enforceability of the agreements to due compliance with Sharia'a principles "over and above" English law but that is not what I think the clause says.

36. Looking at the background, it seems to me clear that 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. Just as I accept there is a genuine conflict of view between the experts, I reject Mr Hacker's submission that, effectively, Dr Lau agrees with what Mr Hacker calls the basic rules of Morabaha and Ijarah. There is clearly great controversy as to the strictness with which principles of Sharia'a law will be interpreted or applied. The English court, as a secular court, is not suited to ascertain and determine highly controversial principles of a religious based law and it is unlikely that the parties would be satisfied by any such ruling; that is not what they were wanting by their choice of law clause.

37. The Rome Convention strongly supports this argument. The lex mercatoria, or general law of merchants, is a law to which some international arbitral tribunals have regard but it is not the law of a country which is capable of ascertainment by expert evidence from practitioners in the country. This court, obviously, is well used to disputes about foreign law and, if necessary, it will determine what a judge in a foreign court would decide had he received submission about Islamic law. That is not the same exercise as determining what, as a matter of English law or applying English law principles, the principles of a religious based law are. Further, I see a distinction between an English court deciding whether, having regard to Islamic religious law principles, a child of separated parents should be required to undergo circumcision or not.

38. Sharia'a principles are not simply “principles of law” but are principles which apply to other aspects of life and behaviour. Sharia'a means, I am told, orthodox. Sharia'a law is the law laid down by the Qur'an and the Sunna which contain the sayings, teachings and actions of the prophet Mohammed) and the only way to know this is through the collection of Ahadith which consists of reports about the sayings, deeds and reactions of the prophet.

39. Whilst in one sense this court will answer any question posed of it, however difficult, it is improbable, in the extreme, that the parties were truly asking this court to get into matters of Islamic religion and orthodoxy. This is a especially so when the bank has its own religious board to monitor the compliance of the bank with the board's own perception of Islamic principles of law in an international banking context.

40. So far as the bank was concerned, that is likely to have been sufficient for its own regulatory purposes and there is no suggestion that the defendants were in any way concerned about the principles of Sharia'a law either at the time the agreement was made or at any time before the proceedings were started. The Sharia'a law defence is, I think, a lawyers' construct but, for the reasons I have given, in my view it does not work.

41. I turn to the second head of defence, namely what I would call the agreement point.

(2.43 pm)

The evidential basis for this alleged agreement is to be found in paragraph 42 of Mr Chowdhury's first witness statement, he being a director of the first and second defendants:

> “During this visit we had free and frank discussions with Mr Abul and his team and explained our problems relating to cash flow as well as the political problems we were facing at that time. He was very sympathetic but explained his problems, and requested us to help resolve his problems relating to the Auditor and regulatory bodies. He impressed upon us that all the paper work relating to the Supplemental Agreement had to be completed to avoid provisioning in their accounts. This should require updated BOI (Board of Investment) permission and signing side letters prepared by their legal advisers and so on. He then requested that we also make a token payment of US $500,000 to give credence to the documents prepared. (My notes of that meeting are attached at page 143 of OKC1). Then we had all the documents signed (See also para 40) and gave two post dated Taka cheques totalling equivalent US $500,000 to them. This was done as explained above solely to help them convince their auditors and regulatory bodies even though we were cash strapped. As part of this discussion he promised that, as we were helping them out, once this immediate problem was resolved, we need not pay any more amounts until a monthly agreeable long term rescheduling had been agreed. I understood that this was a formal agreement on the Claimant's part. We certainly would not have signed the documentation had the Claimant not agreed this. Although there was no specific mention of the guarantees, it was implicit in the discussion that the Claimant would not try and obtain payment from any source until the rescheduling had been agreed.”

42. This evidence is reflected in paragraphs 39 and 40 of the amended defence, which reads:

> "On 29th January 2002 a meeting was held between (amongst others) the third defendant and Mr Chowdhury on behalf of the defendants Juma Abul, Sarfraz and Maaz Khairuddin of the claimant, at which discussions in relation to the restructuring of the debt took place."

Paragraph 40:

> "It was agreed that the parties would continue their past efforts to seek to achieve a mutually acceptable agreement in relation to such a restructuring and it was agreed that, until such a restructuring had been agreed, the first and second defendants' obligations to pay the debt should remain suspended."

43. Mr Doctor says that there is a difference between the way the agreement is spelt out in Mr Chowdhury's witness statement and in the passage of the defence, which I have just referred to, but I shall overlook any difference for present purposes.

44. The effect of the agreement was to put into indefinite suspense, the bank's right to recover any sums due unless and until the defendants' finances were restructured in a way acceptable to them and to which they were prepared to agree. In other words: no further agreement, no repayment. That would be a remarkable agreement for any commercial organisation to make. It would defy both reality and common sense. Nonetheless, Mr Hacker submits that I should regard this part of the case as genuine and not either improbable (justifying a payment into court) or fanciful (justifying its rejection as a potential defence).

45. Mr Hacker submitted that there were four good reasons for this submission: first, he said there was a clear indication that, at the relevant time, the bank was in financial difficulty. Second, if the indebtedness in the present case was written off, that would have eliminated 25 per cent of the bank's net equity. Third, on 4th February 2001, when the exchange agreements were negotiated, four post dated cheques were handed to the bank in the sum of US $3 million yet they were never presented for payment. The defendants say that these cheques were asked for by the bank so that they could be shown to the bank's auditors who were shortly to sign off on the bank's accounts. Four, it appears that the bank were prepared to extend the repayment dates under the exchange agreements by one year, without effectively, any consideration.

46. In my view, none of these points is convincing. The evidence which the defendants rely on shows that the bank was required, by their national regulator, to provide shareholders' guarantees in relation to the bank's exposure in Pakistan and Indonesia. Such a requirement might have been for financial or other regulatory reasons. The bank's audited accounts do not support the contention that the bank had any financial difficulties. As at 31st December 2001, the claimants had total assets of US $2.36 billion. Its owners' equity net assets was US $242 million. If the entire amount of the defendant's debt had to be written off in January 2002, there would have still been an excess of assets over liabilities in a sum of around US $200 million and total assets of about US $2 billion; its solvency would be completely unaffected by the defendants defaulting and disappearing.

47. The post dated cheques were, so I was told by Mr Doctor and accept (the defendants served their evidence late) accompanied by a requirement that they should not be presented for payment until the defendants indicated that they had funds to meet them and that despite many requests, such indication was not given. If the cheques were given to deceive the auditors then such a deception was not likely to work since, presumably, the auditors would have been quite capable of discovering that the cheques which had been shown to them had not in fact been paid or presented. In relation to extending credit facilities for a further year, it is common ground that the claimants obtain some consideration for this.

48. The picture is clear, from the contemporaneous correspondence: it is of a claimant bank who has advanced monies seeking to chase repayment and extending time to accommodate a defaulting client. I refer in particular to two letters: the first is dated June 5th and is to be found in bundle 6 at page 1474. In that letter, the bank is chasing payment. It notes that the defendants are seeking yet further time. The bank states:

> "However, we have been more than generous in our dealings (with the defendants) in the past and are not prepared to agree to any further rescheduling. As was made clear in our letters of 9th April, 15th April and 3rd June, we expected payment of the first instalment of the user fee on 10th April and of the accrued compensation by no later than 4th June, in accordance with the terms of the agreements. In view of your breaches, please note that the bank reserves its right to take whatever action it deems necessary."

Second, there is a letter dated 11th July from one of the two personal defendants addressed to Mr Abul who is the head of remedial management at the claimant bank:

> "We refer to your letter of 5th June and are surprised and disappointed to note that you are not agreeable to reschedule our loan. You will recall that when you visited us in January 2002, you requested us to sign a new supplemental agreement, number 2, in order to avoid classification of the loan in your 2001 balance sheet. You also requested us to obtain BOI permission on the basis of new agreement. This agreement you asked us to sign with the date of 30th January 2002, although the agreement was signed in March. At that time, you told us that the bank would reschedule our loan appeal provided we executed the above documents. Over this assurance, we agreed to execute the documents you requested. Your bank approached us through our friend, the former vice-chairman of [another company], to sign new documents as per your request to help you resolve your problems.
>
> We reiterate that we have already paid you US$11.3 million out of total compensation of US$14.3. We have fully securitised your loan and paid you all the rescheduling fees amounting to more than US$600,000. As mentioned in our letter of 23rd May, we need some time because of our present liquidity crisis but we are trying our best to pay you some compensation. We assure you that by September we will pay a substantial amount of overdue compensation. We would again request you to reschedule our loan and give us time to pay the overdue compensation."

On 26th August 2002, the defendants sought a meeting with senior people within the bank to discuss the issue of late payment and the future repayment schedule. The closest the defendants came to mentioning the alleged agreement was in their letter of 11th July but what was said was quite inconsistent with them believing that there was no liability on them to make any further payment because of an agreement. Rather, it was the preamble for them asking for yet more than time. In commercial terms, the alleged agreement makes no sense. Had it been made, I would have expected it to have been recorded in writing; it was obviously important to a defaulting debtor and I would have expected some early reference to the agreement as an immediate response to the bank's pressures and demands. Instead, the reference to the agreement appeared for the first time in the defence.

49. I regard this defence as fanciful and with it also the defence of estoppel. I do not believe that any agreement or representation was made having regard to the facts and matters to which I have made reference. Merely because the contrary has been asserted in the witness statement, I am not required to accept it if it is, as I believe it to be, quite incredible.

50. I turn therefore to the question raised under the guarantees Mr Hacker says that the guarantees are void because first: the bank did not have the capacity to enter into them, capacity being a question to be decided exclusively by Bahrain law. Secondly: they are void for mutual mistake, and he draws the court's attention to the relevant principles set out in the case of Associated Japanese Bank v Credit Du Nord reported at 1989 one weekly law reports page 255 at pages 264 C to 269 B. And Great Peace Shipping v Tsavliris Salvage Limited reported at 2003 Queen's Bench 679 at paragraph 73 to 161 And thirdly since the underlying obligations are void or illegal, the guarantees are void and should not be enforced

51. I turn to the first point, which is supported by the evidence of a Bahrain law expert, Mr El Nayal. I am afraid that this opinion does not stand up to scrutiny. The essence of his opinion is based upon article 185 of the New Commercial Companies Law (decree law number 21 for the year 2001). At paragraph 24 of his report, the learned author makes reference to what he says are the Memorandum and Articles of Association of the claimants "which has been provided to me". He does not produce the document provided to him, which I gather was not provided to him by the defendant's lawyers in this country. He quotes from this document, but the true memorandum and articles of association of

the bank have been produced in evidence, and I have already referred to them, and they do not contain the words to which this person is making reference. But he continues, at paragraph 25 and through to 27, to express his opinion:

> "The Claimant, being a company organised under the laws of the Kingdom of Bahrain, is under a prime obligation to perform its objects in accordance with its Memorandum and Articles of Association. The principal object of the Claimant under its Memorandum and Articles of Association is to undertake financial and banking transactions in accordance with Islamic Sharia'a. This is also a duty imposed upon the Claimant under the Law (Commercial Companies Law) the circulars and ministerial orders/resolutions read with the Governance Standards for Islamic Financial Institutions issued by AAOIFI. Under the laws of Bahrain the Claimant has no capacity to enter into any financial and banking transaction or any other business activity which is beyond the scope of its principal object. Any transaction entered into by the Claimant which is contrary to its principal object shall be null and void in the laws of Bahrain. It is a prime obligation of the Directors to comply with the provisions of the Memorandum and Articles of Association of the company. Article 185 of the New CCL reads as follows:
>
> 'The chairman and the other members of the board of directors shall be liable to the company, the shareholders and the third parties for acts involving betrayal of trust, misuse of power, breach of the law or breach of the Articles of Association of for their mismanagement of the company. Any provision in contravention of the foregoing shall be deemed null and void.
>
> Any proposal of the general meeting intended to exonerate the board of directors shall not avail against instituting an action of liability against the board.'
>
> 26. It may be noted from the above provision that an act committed by a company, through its directors or any other employee through his/her authority to act for the said directors in breach to the Memorandum and Articles of Association of a company, is deemed to be an act committed in violation of the Law as per the express provisions of the above Article. Therefore, by virtue of this Article (Article 185) if a transaction has the effect of breaching the Law or breaching the Articles of Association, then the transaction is null and void. The liability of the Directors and/or their agents acting on their behalf extends also to the third parties and it is not limited to the company and shareholders."

52. He is there saying that, by virtue of Article 185, if a transaction has the effect of breaking the law or breaking the Articles of Association, then the transaction is null and void and the bank had no capacity to enter into it. But, with very great respect to this person, it is plainly obvious from the extract of the Article 185 that he has misinterpreted it. The only way that that Article can be read is that it is saying that any provision which seeks to exclude liability to the company, of the board, shall be deemed null and void. His whole thesis on the question of capacity is therefore fundamentally flawed and a trial is not required in order to establish what is obvious. The guarantee is governed by English law and I can see no reason, in principle or law, why it should not be enforced, in accordance with its terms, including the provision that, if the underlying obligations are void or unenforceable, the guarantors remain liable as principal debtors.

53. In the light of my other findings, that is sufficient to dispose of the first head of defence to the guarantee. As to mistake, because I have rejected the argument that, subject to the provisions of Glorious Sharia'a, has the meaning contended for, this defence does not arise but, if it did, it seems to me that a common mistake as to the legal consequences of an agreement would not qualify as a mistake apt to give rise to a defence in any event.

54. The third guarantee defence also does not arise. The result of all this is that, in my judgment, the defendants have shown no arguable defence to the claim against them and there must be judgment for the full sums against each of them.

55. Had I been considering the question of conditional leave, on the basis that the defences raised were improbable, both in relation to the claim under the ESUAs and the guarantees, I would have demanded that, as a condition of leave to defend, the full sums should be paid into court. Mr Hacker

indicated that there were agreements by which the bank was already being secured by charges over assets et cetera. He also hinted at the defendants' impecuniosity.

As to the assets, it is significant that he is accepting and asserting that those agreements are binding despite the fact that they seek to secure the indebtedness which he says does not exist. But, in any event, the security is over property and assets located in Bangladesh and enforceable, presumably, only in that country. The defendants have offered no undertaking to consent to the enforcement of the security or to facilitate their enforcement in Bangladesh.

I cannot, on the material before me, say whether or not the security has any, and if so, what value. As to the impecuniosity point, no evidence has been filed to deal with the assets of the defendants and, in the absence of any, I certainly would not be prepared to infer that they could not raise the money they would be required to produce as a condition of obtaining leave to defend, had the question of conditional leave arisen, which it has not.

Accordingly, for the reasons I have attempted to give, I give judgment for the claimants on their claim.

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