DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

DALAM NEGERI WILAYAH PERSEKUTUAN MALAYSIA

(BAHAGIAN KUASA-KUASA KHAS)

[PERMOHONAN SEMAKAN KEHAKIMAN NO: WA-25-517-11/2019]

Dalam perkara Perkara 5, 7 dan 8, Pelembagaan Persekutuan

Dan

Dalam perkara Seksyen 25(2) dan/atau item 1 dan 11, Jadual, Akta Mahkamah Kehakiman 1964

Dan

Dalam perkara Aturan 53, Kaedah-Kaedah Mahkamah 2012 dan/atau bidang kuasa sedia ada Mahkamah

Dan

Dalam perkara Seksyen 276(1), 276(3), 354(1)(a), 354(4) dan 364 Akta Pasaran Modal Dan Perkhidmatan 2007

Dan

Dalam perkara Seksyen 15 dan 16 Akta Suruhanjaya Sekuriti Malaysia 1993

Dan

Dalam perkara Keputusan Suruhanjaya Sekuriti Malaysia bertarikh 30.01.2019 berkenaan Notis Tunjuk Sebab bertarikh 07.09.2018 yang menentukan Pemohon telah melanggar Seksyen 354(1)(a), Akta Pasaran Modal Dan Perkhidmatan 2007 dibaca bersama Seksyen 276(3)(b) dan 276(1)

Dan

Dalam perkara Keputusan Suruhanjaya Sekuriti Malaysia bertarikh 19.08.2019 yang mengesahkan keputusannya yang bertarikh 30.01.2019

ANTARA

DELOITTE PLT ... PEMOHON

DAN

SECURITIES COMMISSION OF MALAYSIA ... RESPONDEN

GROUNDS OF JUDGMENT

INTRODUCTION

[1] This is the Applicants' application for judicial review which seeks inter alia for the followings:

i. That leave be granted to the Applicant pursuant to Order 53 Rule 3 of the Rules of Court 2012 to apply for judicial review proceedings of the Respondent's decision dated 19.8.2019, affirming its decision dated 30.1.2019, and for an order of certiorari to enter the said decision into the High Court to be quashed forthwith;

ii. That the Applicant be permitted to file further affidavits as the Applicant considers necessary for the purposes of the substantive judicial review proceedings herein;

iii. An order that the Respondent repays to the Applicant the sum of RM2.2 million which was previously paid by the Applicant in the event the application for judicial review is determined in the Applicant's favour;

iv. Costs of and incidental to this application be cost in the cause; and/or

v. Any further and/or other order this Honourable Court deems fit and/or otherwise appropriate.

BACKGROUND FACTS

[2] The Applicant is a limited liability partnership under the Limited Liability Partnership Act 2012 and its business address is at Level 16, Menara LGB, Jalan Wan Kadir, Taman Tun Dr Ismail, 60000, Kuala Lumpur.

[3] The Applicant, are a large and well-known accounting services

firm. They were also the auditors of Bandar Malaysia Sdn Bhd ("**BMSB**") and 1MDB Real Estate Sdn Bhd ("**1MDB RE**") and currently known as TRX City Sdn Bhd ("**TRX CITY**") for the financial years ended 31.3.2015 and 31.3.2016.

[4] 1MDB RE was, at the material time, wholly owned by 1Malaysia Development Berhad ("**1MDB**") and BMSB was a wholly owned subsidiary of 1MDB RE.

[5] On 26.12.2013, the Securities Commission of Malaysia (the "**SC**"/ Respondent) had authorised BMSB's proposed issuance of up to RM2.4 billion unrated Islamic Securities under an Islamic Securities Programme based on the Shariah Principle of Murabahah ("**the Sukuk Murabahah Programme**") subject to certain conditions.

[6] AmInvestment Bank Berhad ("**AmInvestment"**) was appointed as the Facility Agent, Security Agent and Lead Manager of the Sukuk Murabahah Programme, whereas AmTrustee Berhad, currently known as MTrustee Berhad **("MTrustee**") was appointed as trustee for the Programme.

[7] The Respondent (the **"SC"**) is a body corporate established under the Securities Commission Malaysia Act 1993 (the "**SCMA"**). Under Section 15 of the SCMA, the Respondent has several functions which includes regulating all matters relating to the capital market and ensuring that the provisions of securities laws are complied with. Section 16 provides that the Respondent shall have all such powers as may be necessary for or in connection with, or reasonably incidental to, the performance of its functions under the securities laws. The Respondent also administers the Capital Markets and Services Act 2007 (the "**CMSA**") and Securities Industry (Central Depositories) Act 1991.

[8] Under the CMSA, the Respondent is empowered to take action

against a person who contravenes the provisions of the Act other than the provisions of Part v. and Division 2 of Part VI or any securities law (Section 354 (1)(a)). No action will be taken against a person who breaches the Act without giving an opportunity to be heard (Section 354(4). The Respondent may review its own decisions under the Act upon application by any person aggrieved by such decision (Section 364).

[9] It is pertinent to note that the SC, as regulator of the capital market, is vested with statutory functions under the securities laws, which are inter alia:-

(a) To regulate all matters relating to the capital market;

(b) To ensure that the provisions of the securities laws are complied with; and

(c) To take all reasonable measures to maintain the confidence of investors in the capital market by ensuring adequate protection for such investors.

[10] On 7.9.2018, the Applicant received a Show Cause Notice from the Respondent concerning the alleged breaches of Section 354(1)(a) of the Capital Markets and Services Act 2007 (Exhibit A-1 pages 1-8, the Applicant's Affidavit In Support).

[11] The SC took action against the Applicant for several breaches of the CMSA. It is said the Applicant had identified several irregularities in the Audited Financial Statements ("**AFS**") for 2015 and 2016 but failed to report these irregularities to the SC and this was a breach of Section 276(3)(b) of the CMSA for each year (**the 1st and 2nd Breaches**).

[12] The Applicant had also failed to provide copies of the relevant AFS for 2015 and 2016 to the Trustee of the Sukuk Murabahah

Programme. This was a breach of Section 276 (1) of the CMSA for each of those years (**the 3rd and 4th Breaches**)

[13] The SC, had on 30.1.2019 reviewed and considered all the issues raised by the Applicant, documents and information submitted in the Applicant's written explanations. The SC then decided that the Applicant had breached the following:

i. Section 354(1)(a) of the Capital Markets and Services Act, 2007 read together with Section 276(3)(b) of the CMSA in relation to the failure of the Applicant to immediately report to the SC the matters highlighted in the Applicant's Independent Auditors' Report for the Audited Financial Statements ("**AFS**") of Bandar Malaysia Sdn Bhd and 1MDB Real Estate Sdn Bhd (currently known as TRX City Sdn Bhd) ("1MDB Re"), both for the financial years ended 31.3.2015 dated 18.3.2016, which are irregularities that may have a material effect on the ability of BMSB to repay any amount under the RM2.4 billion unrated Islamic Securities under an Islamic Securities Programme based on the Shariah Principle of Murabahah ("the Sukuk Murabahah Programme") ("**the 1st Breach**");

ii. Section 354(1)(a) of the CMSA read together with Section 276(3)(b) of the CMSA in relation to the failure of the Applicant to immediately report to the SC the matters highlighted in the Applicant's Independent Auditors' Report for the AFS of BMSB for the financial year ended 31.3.2016 dated 27.6.2016 and the Applicant's Independent Auditors' Report for the AFS of 1MDB Re for the financial year ended 31.3.2016 dated 15.11.2016, which are irregularities that may have a material effect on

the ability of BMSB to repay any amount under the Sukuk Murabahah Programme **("the 2nd Breach**");

iii. Section 354(1)(a) of the CMSA read together with Section 276(1) of the CMSA in relation to the failure of the Applicant to send a copy of the AFS of BMSB for the financial year ended 31.3.2015 to MTrustee Berhad within seven days after furnishing BMSB with the said financial statements ("**the 3rd Breach**"); and

iv. Section 354(1)(a) of the CMSA read together with Section 276(1) of the CMSA in relation to the failure of the Applicant to send a copy of the AFS of BMSB for the financial year ended 31.3.2016 to MTrustee Berhad within seven days after furnishing BMSB with the said financial statements ("**the 4th Breach**").

[14] On 30.1.2019, the Respondent provided its written decision on the Show Cause Notice (Exhibit A-11 pages 433-436 Jilid 5-6). The Respondent concluded that the Applicant had breached Section 276(3)(b) and 276(1) read together with Section 354(1)(a) of the CMSA 2007 . The sanctions imposed against the Applicant were as follows:

a. The 1st Breach:

i. Reprimand; and

ii. Penalty of RM1,000,000.00;

b. The 2nd Breach:

i. Reprimand; and

ii. Penalty of RM1,000,000.00;

c. The 3rd Breach:

i. Reprimand; and

ii. Penalty of RM100,000.00.

d. The 4th Breach:

i. Reprimand; and

ii. Penalty of RM100,000.00.

[15] Dissatisfied with the said decision, the Applicant had on 27.2.2019, submitted the Review Application pursuant to Section 364 of the CMSA 2007 on the grounds that:

a. The Applicant requested an oral hearing as it was necessary to address the novel and complex issues in relation to the 1st and 2nd Breaches.

b. Section 276(3)(b), CMSA did not apply to the Sukuk Programme.

c. There was a denial of natural justice in relation to the 1st and 2nd Breaches as the charges framed in the Show Cause Notice were vague and ambiguous.

d. The sanction imposed by the Respondent were disproportionate.

[16] The Applicant, through its solicitors' letter dated 3.4.2019 made a further representation on the following grounds:

a. Requested for a consideration on the need for an oral hearing;

b. Emphasised that the administrative action taken against the Applicant was merely for it to be made an example of to a wider market. It referred to the Edge Article;

c. Further emphasised that the administrative action appeared to have been grounded on matters pertaining to 1MDB and not BMSB and 1MDB RE, a matter made clear by the Edge Article and

e. Further emphasised that the Edge Article gave rise to an impression of bias.

[17] The Respondent via its letter dated 19.8.2019 delivered its decision on the Review Application (the **"Review Decision/ Impugned Decision"**). The Review Decision dismissed the Review Application and maintained the findings of breach and quantum of penalties imposed in the Initial Decision. The Respondent reiterated the reasoning for its original decision and further added as follows:

i. There was no breach of natural justice on the part of the Respondent as the Applicant was given a reasonable opportunity to make its representation and was fully aware of the nature of the breaches involved;

ii. There was no pre-judgment bias;

iii. The sanctions imposed were proportionate to the breaches; and

iv. The mitigating factors submitted in the Review Application were inadequate and did not diminish the seriousness of the breaches.

[18] Based on the Impugned Decision, the Applicant was required to pay the penalty of RM2.2 million to the Respondent. On 4.9.2019 the

Applicant's solicitor forwarded the Respondent a CIMB Banker's Cheque No.060082 dated 28.9.2019 for the payment of RM2.2 million which was made without any prejudice to the Applicant's right to initiate judicial review proceedings against the Respondent.

[19] Dissatisfied with the Respondent's Review Decision/Impugned Decision, the Applicant filed this judicial review application on the grounds:

A. <u>Illegality</u>

[19.1] The Impugned Decision was illegal on the grounds:

a. The Respondent applied an interpretation of reportable irregularity under Section 276(3)(b) as against the Applicant that the Respondent had not applied to any person at the time of the audits in question. This was not permissible by virtue of Article 7(1), Federal Constitution and by the rules of natural justice;

b. The matters in issue took place in 2016 but the Notice of Show Cause was only issued in September 2018;

c. At the material time, the Respondent did not view those matters as a reportable irregularity despite the fact that it was publicly known. The Respondent only took the position that section 276(3)(b) applied to such matters subsequently and applied it to the prior events.

d. The comments by the Chairman clearly demonstrate the intention of the Respondent to penalise past conduct connected with 1MDB.

[19.2] **The Sukuk Programme did not fall within the ambit of Section 276 of CMSA which concern debentures.**

The nature of a Sukuk Murabahah does not involve indebtedness or repayment of borrowings. Although the CMSA Order (which relied on by the Respondent) includes Islamic securities as securities for the purposes of securities law in general, it does not vary the definition of 'debenture' or include 'Islamic Securities' within the said decision. Therefore, "debenture" is left unvaried.

[19.3] **The Respondent applied an interpretation of Section 276(3)(b) of CMSA that was not supported by law.**

A purposive interpretation of Section 276 required that reportable irregularities were irregularities that concerned fraud, theft and/or material breaches of fiduciary duties that came to the attention of an auditor in the course of an audit. Auditors were required to act as whistle blowers in connection with irregularities of significance.

In interpreting Section 276(3)(b) as warranting the reading of "*irregularities*" with the phrase "*that may have a material effect on the ability of the borrower to repay any amount under the debenture*". The Respondent had failed to apply settled principles of statutory interpretation. It had interpreted the said provision in a manner that enabled it to subjectively determine, at its own discretion, what a reportable irregularity was. This was impermissible in law.

[19.4] The Applicant's right to due process under Article 8, Federal Constitution and natural justice had been violated, in particular:

i. The Applicant was not given an opportunity to an oral hearing for the purpose of the Review Applications. This impeded the Applicant from fully understanding and addressing the complaint against it;

ii. This was an appropriate case for an oral hearing and was also necessary given the ambiguity of the charges, the involvement of complex and novel issues, and the comments by the Chairman; and

iii. The Applicant was not given the opportunity to be heard on the imposition of sanctions. The Show Cause Notice only required the Applicant to provide a written representation as to why it was not in breach of the relevant CMSA provisions. The said representation was submitted for that purpose. The Applicant was not allowed to mitigate once the Respondent was satisfied that it was appropriate to take action against the Applicant.

[19.5] The Respondent had singled out the Applicant for the purpose of making example of it. This selective treatment of the Applicant was discriminatory and it violates Article 8, Federal Constitution.

[19.6] The Respondent had acted in a manner that exceeds the powers vested in it by law and it was not permitted in law.

B. <u>Procedural impropriety</u>

[19.7] The Impugned Decision was in breach of the rules of natural justice. The Applicant had made repeated request for clarification but the Respondent refused the said request and

instead maintained the charges against the Applicant. The Respondent had failed to allow the Applicant an oral hearing address the comments by the Chairman in the article in the Edge.

C. <u>Irrationality/ unreasonableness</u>

[19.8] The Respondent failed to take into account the relevant considerations:

i. The Applicant's explanation on the recoverability of the amounts owing by 1MDB to 1MDB RE Group;

ii. There was no event of default in respect of Sukuk Programme for 2015 and 2016 which was not due for repayment during the said period;

iii. The Trustee was fully aware of the financial position of MBSB and 1MDB RE; and

iv. The Applicant relied on the representations given by the management at the time of the audits, these not having given rise to any concern;

v. The impugned decision was in defiance of logic and/or a decision that no reasonable tribunal in the same position would arrive at; and

vi. The Respondent had acted in excess of its powers.

D. Disproportionality

[19.9] The charges in relation to the 3rd and 4th Breaches were merely a technical non-compliance of Section 276(1) of CMSA. A fine of RM100,000.00 for each breach was not warranted.

[19.20] The penalties given by the Respondent for the 1st and 2nd Breaches were the maximum amount allowed under the CMSA and this was excessive.

[19.21] The Respondent did not have an objective basis for the imposition of fines of RM1 million for each of the 1st and 2nd Breaches.

[19.22] The Applicant had not been made subject to any administrative action on the part of the Respondent.

DECISION OF THIS COURT

The law

[20] The law on judicial review is well settled that the court may review a decision in the exercise of public duty or function on the grounds of illegality, irrationality or procedure impropriety. In recent Federal Court case of *Peguam Negara Malaysia v. Chin Chee Kow (sebagai Setiausaha Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan and another appeal* [2019] MLJU 202, the grounds for judicial review is reiterated in the following words;

> ***"[60]*** *This landmark decision moved the courts from a position of deciding whether prerogative power existed to deciding if they were being carried out lawfully. Lord Diplock in his speech at p.401D of the* ***GCHQ case*** *enunciated three classic grounds for judicial review:*
>
> *"Judicial review has I think developed to a stage today when ... one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety."*

...

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By 'irrationality' I mean what can now succinctly be referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in it defiance of logic or of accepted moral standards that no reasonable person who had applied his mind to the question to be decided could have arrived at it."

ISSUES TO BE DETERMINED BY THIS COURT

[21] Whether the Impugned Decision dated 19.8.2019 on the Review Application was tainted with illegality, irrationality, procedure impropriety and proportionality. After having considered the application and submission by the parties, this court makes the following findings:

NOTICE TO SHOW CAUSE

[22] It is the Applicant's contention that the matters set out in the Notice to Show Cause issued by the SC were vague and ambiguous. The court refers to the Notice to Show Cause dated 7.9.2018 and is of the view that the Notice to Show Cause is comprehensive. It contains adequate and sufficient details and particulars of the breaches so as to make the Applicant aware of the nature of the case they would have to

meet and answer.

[23] The Notice to Show Cause also identifies the specific grounds upon which the specific sections of the CMSA have been breached. In fact, it contained identification of the following:

(i) The relevant provisions of the Trust Deed entered between BMSB and MTrustee on 13.2.2014 ;

(ii) The relevant financial statements for the Financial Year Ended 2015 and 2016 for BMSB and 1MDB Re;

(iii) The relevant excerpts of the Independent Auditors' Reports by the Applicant;

(iv) The matters which the SC considered to be irregularities that ought to have been reported immediately to the SC; and

(v) The specific provisions of the CMSA said to have been breached.

It is very clear that the grounds given in the notice are clear, specific and unambiguous.

[24] Obviously, from the written explanations submitted by the Applicant, it was very clear and fully understood by the Applicant the nature of the breaches that formed the basis of the Notice to Show Cause by the SC. Therefore, it is not true for the Applicant to say that the Notice was not clear, vague and ambiguous.

RIGHT TO BE HEARD

[25] Section 354(4) of CMSA provides the right to be heard be given to the person in breach an opportunity to be heard. The Applicant

alleged that it has been deprived of an opportunity to be heard and has been breached the rules of natural justice.

Section 354(4) states that:

"(4) The Commission shall not take any action under subsection (3) without giving the person in breach an opportunity to be heard."

[26] The Court refers to paragraph 25 of the Notice to Show Cause where the Applicant was accorded an opportunity to provide a written explanation to the Respondent within 14 business days from the date of the Notice to Show Cause as to why action should not be taken against the Applicant under Section 354(3) of the CMSA. The series of correspondences (letters) between the Applicant and the Respondent showed that the Applicant was permitted to file 3 responses to the Notice to Show Cause. This can be seen at Exhibit A-6 (letter dated 1.10.2018), A-8 (letter dated 12.11.2108) and A-10 (letter dated 11.1.2019), the Applicant's Affidavit In Support.

[27] Besides the three responses to the Notice to Show Cause from the Applicant, the SC on 23.10.2018 and 20.12.2018 had given the Applicant the opportunity to provide further particulars to address issues raised in the Applicant's written explanation and also a further written explanation to the SC within 14 business days (Exhibit A-7 and A-10, the Applicant's Affidavit In Support).

[28] Subsequent to the Decision, the Applicant sought a Review of the Decision under Section 364 of the CMSA. Under Section 364, the Commission may review its own decision under the Act upon an application made by any person who is aggrieved by such decision. In arriving at the Review Decision, the Applicant again was accorded a further opportunity to be heard and to present its position to the SC (see Exhibits A-14, A-15, A-16, A-17 and in A-18, the Applicant's Affidavit In Support). Later, the Applicant, through its solicitors,

confirmed that it had nothing further to add as it contended that it had fully substantiated the Review Application.

[29] It is also pertinent to note that, the Applicant availed itself of the opportunity at every stage of the process and submitted its explanation at length in the process. It is no doubt that from the written explanations submitted by the Applicant, the Applicant has fully understood the nature of the breaches that formed the basis of the Notice to Show Cause by the Respondent.

[30] The Applicant did not make any request for an oral hearing during the representation leading up to the initial decision. The Applicant only raised its request for an oral hearing for the first time during the Review Application. The Respondent then by a letter dated 15.3.2019, informed the Applicant that it had considered the Applicant's request for an oral hearing but took the position that the Review Application could be fairly and effectively determined by way of written representations without the need for an oral hearing, as was done at the first instance. The Respondent again accorded an opportunity for the Applicant to provide a further written representation to the Respondent within 14 business days, so as to allow the Applicant a chance to make any other representations it may have left out (see Exhibit A-15).

[31] After deliberation and taking into consideration all factors and information submitted, the Respondent decided on 19.8.2019 to dismiss the Review Application and the reasons for the Review Application were provided in the said letter (see Exhibit A-19).

[32] Based on the facts of the case, the Court is of the considered opinion that the Applicant was accorded with numerous opportunities to be heard on all matters including the imposition of sanctions. The Applicant was not restricted in any way. A right to be heard does not in all circumstances include a right to an oral hearing. It is not an

automatic right unless the CMSA provides otherwise. Justice Rohana Yusuf (now, President Court of Appeal) in *Khiudin Mohd & Anor v. Bursa Malaysia Securities Bhd & Another case* [2012] 7 CLJ 407 held that:

> *(4) Bursa's enforcement proceedings were premised on documentary evidence and written representations of the parties.* ***The right to natural justice requires a right of fair hearing which cannot be equated with a right to an oral hearing (Ketua Pengarah Kastam v. Ho Kwan Seng (refd)). In absence of mandatory rule, the right to oral hearing is not an automatic right. So long as fair opportunities are given to the person, the audi alter partem rule is considered observed.*** *On the facts, Bursa had sufficiently accorded the applicants the right to be heard by allowing them to challenge the evidence tendered against them by putting their cases before the Listing Committee orally. Hence, sufficient opportunity was given to all the applicants to present their respective cases, and in the circumstances, the right of hearing has indeed been complied with by Bursa. (paras 31-32) (Emphasis added by this court)*

[33] Procedural fairness is not diminished by the refusal to accede to a request for an oral hearing as the Applicant all the while was given all the opportunity to state its case by several written representations. The Respondent has complied with Section 354(4) of CMSA before taking action under section 354(3). The Respondent did not depart from the appropriate legal standard for giving the Applicant an opportunity to be heard. The Applicant was not in any way deprived of procedural fairness as they alleged. Therefore, there is no breach of natural justice and procedure impropriety.

INTERPRETATION AND APPLICABILITY OF SECTION 276 (3)(b) OF THE CMSA

[34] The Applicant raised the issue of the applicability of Section 276 of the CMSA and contended that the Sukuk Murabahah Programme does not fall within the said Section as it does not include the execution of a Debenture. The Applicant submits that Section 276(3)(b) is concerned with ability of a borrower to repay any amount under a debenture and "debenture" is defined in Section 2, CMSA as "indebtedness of corporation for borrowed monies". Therefore, the provision is limited at irregularities in relation to the payment of monies. However, a Sukuk Murabahah does not involve indebtedness. Therefore, the Applicant is not under any reporting obligation to the SC.

[35] Further, the Applicant alleged that the Capital Markets and Services (Prescription of Islamic Securities) Order 2012 P.U (A) 478/2012 (the "**CMCA Order**"), though included Islamic securities as securities for the purposes of securities laws, the CMSA Order could not be understood as having varied the definition of "debenture" in Section 276(3)(b). The effect of the CMSA Order was merely to require that Islamic securities be treated as securities.

[36] Section 276(3)(b) of the CMSA provides as follow:

"Duty of auditor to trustee for debenture holders

(3) Where in the performance of his duties as auditor for the borrower, the auditor becomes aware –

(b) of any irregularities that may have a material effect on the ability of the borrower to repay any amount under the debenture,

The auditor shall immediately report the matter to the Commission."

[37] Order 4 of CMCA Order states that:

"*Application of Division 4 of Part VI of the Act*

4. Any reference to the "borrower" in Division 4 of Part Vi of the Act shall be construed as a reference to "issuer of sukuk" or "issuer of an Islamic structured product" for the purposes of the application of those provisions to sukuk or Islamic structured product."

Division 4 Part VI covers Sections 257 to 286 of the CMSA.

[38] This Court finds that the SC has addressed this issue comprehensively in paragraph 3 of its letter dated 23.10.2018 (Exhibit A- 7 of the Applicant's Affidavit In Support). In essence, the SC took the position that applying a purposive interpretation of the Order 4 of the Capital Markets and Services (Prescription of Islamic Securities) Order 2012 P.U.(A) 478/2012 (the **CMSA Order**), which states that *"any reference to the "borrower" in Division 4 of Part VI of the CMSA shall be construed as a reference to "issuer of sukuk" or "issuer of an Islamic structured product" for the purposes of the application of those provisions to sukuk or Islamic structured product" (refer to exhibit SC-2, Respondent's Affidavit In Reply (1)),* would mean the legislative intention was to have the obligations under Section 276 of the CMSA apply to any issuer of Sukuk for the purposes of any Sukuk.

[39] The SC has rightly concluded that the Sukuk Murabahah Programme falls within the provisions of Section 276(3)(b) of the CMSA in light of the CMSA Order and that the said Section should be read to include Sukuk and the obligation to pay any receivables arising from the underlying contract under the Sukuk Murabahah Programme. This is evident from the reasons provided by the SC in its letter dated 30.1.2019.

[40] Order 4 of CMSA Order should not be read in isolation from

Section 276(3)(b) of CMSA. By the CMSA Order, the Minister had modified the wording of Section 276(3)(b). The word "borrower" was modified to read "issuer of sukuk" and this was done for the purpose of the application of those provisions in Division 4 of Part VI of the CMSA to Sukuk or Islamic structured product. This Court agrees with the Respondent's counsel submission that by the modified wording, the Minister had, consistent with its context and the principles of harmonious and purposive construction, clearly expressed an intention that the whole of the section was to apply to an auditor of an issuer of Sukuk.

[41] In *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v. Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2017] 5 MLJ, 771, CA, the Court of Appeal held that:

> *"[23] The golden rule of interpretation in construing a statute is to ascertain the true intention of the Legislature and in doing that the courts are duty bound to adopt an approach that promotes the purpose or object underlying that particular statute. To ascertain the meaning of a clause in a statute, the whole statute must be looked at and not merely at the clause itself. Where the language of the words employed are clear and succinct giving no rise to any ambiguity, the courts must interpret them as they are. Only when there is some doubt from the words employed in the legislation can the courts adopt a purposive approach to the interpretation of legislation."*

[42] The Federal Court in *Tunku Yaakob Holdings Sdn Bhd v. Pentadbir Tanah Kedah & Ors* [2016] 1 MLJ 200, FC held that:

> ***"[51]*** *From our reading of the Court of Appeal's judgment, it appears that there could be two interpretations as to when the*

decision to be challenged was first communicated to the appellant ie the date of publication of Form D in the Gazette and it 'can also occur' at the date when Form E was served on the appellant. ***The settled general rule is that 'when a statute is susceptible of two or more interpretations, normally that interpretation should be accepted as reflecting the will of the legislation which is presumed to operate most equitably, justly and reasonably as judged by the ordinary and normal conceptions of what is right and what is wrong and of what is just and what is unjust'.*** *This principle is clearly stated in Bindra's Interpretation of Statutes (7th Ed) at p 554; which was accepted by the Federal Court in Ex- parte: Guan Teik Sdn Bhd." (Emphasis added by this Court))*

[43] The literal interpretation preferred by the Applicant would result in an absurd conclusion in that Sukuks would not be regulated by the SC nor would Sukuk holders be accorded protection and safeguard under Section 276(3)(b) of the CMSA. This would mean that Sukuks would not be regulated and Sukuk holders would not be accorded the protection and safeguards under Part VI Divison 4 of the CMSA in particular Section 276. This construction would not promote the purpose of the CMSA.

[44] This Court is of the considered view that the Respondent's interpretation and application of Section 276(3)(b) is correct in law. Section 276(3)(b) of CMSA must be read in conjunction with the CMSA Order and the SC's Guidelines on Sukuk dated 8.1.2014. The matters set out in paragraphs 9.1, 10.1-10.3, 14.1 and 15.1-15.3 of the Notice to Show Cause clearly would give rise to irregularities within the meaning and ambit of Section 276(3)(b) of the CMSA. The Applicant having themselves highlighted the said matters in the Independent Auditors' Reports ought to have immediately reported the same to the Respondent. Failure to do so amounts to a breach of

Section 276(3)(b).

[45] The Respondent has not misdirected itself in law and has applied the proper construction and/or interpretation of the relevant legislative provisions in light of duties and responsibilities of the Respondent as a regulator of the capital markets.

FAILURE TO SEND A COPY OF THE AUDITED FINANCIAL STATEMENTS TO MTRUSTEE BERHAD

[46] The Applicant admits the 3rd Breach and the 4th Breach, but then states they were merely technical non-compliance. The Applicant contended that the said failure to send the audited financial statements of BMSB to MTrustee had no ramifications to the parties. In any event, this does not in any way derogate from or lessen the seriousness or gravity of their breaches of the statutory obligations. The Applicant has committed breaches under Section 276(1) of CMSA and under Section 354(1) of CMSA, the SC is entitled to take action against the Applicant for these breaches. Section 276(1) of CMCA provides:

> ***"Duty of auditor to trustee for debenture holders***
>
> *276. (1) An auditor of a borrower shall, within seven days after furnishing the borrower with any balance sheet, profit and loss account or any report, certificate or other document which he is required by the Companies Act 1965 or by the debenture or trust deed to give to the borrower, send a copy of such balance sheet, profit and loss account, report, certificate or other document by post to every trustee for the holders of debentures of the borrower."*

It is not only the effect of the failure on the part of the Applicant that is to be considered. The SC also considered that this is a breach of a

statutory obligation on the part of a firm of auditors, which it takes seriously. The gravity of the breaches were taken into account in determining the severity of the penalty, as can been seen in comparison with the penalties imposed for the 1st Breach and the 2nd Breach. The SC regards compliance with statutory obligations as a fundamental feature in the operation of capital markets in Malaysia.

THE ARTICLE IN THE EDGE

[47] The Applicant raised the issue of the comments made by the Chairman of the SC in an article entitled "Invigorating The Market" published by The Edge Malaysia on 18.3.2019 ("**The Edge article**"). It is the Applicant's contentions that the comments made by the Chairman of the SC gave rise to an impression that the Decision had been pre- judged, biased and was intended to address the situation of 1MDB.

[48] The Respondent has addressed this issue comprehensively in paragraphs 2.4 to 2.7 of its letter dated 17.4.2019 (Exhibit A-17). The Edge article does not in any way suggest that the Respondent's Decision or its decision to issue the Notice to Show Cause were tainted with pre-judgment bias. The article was published 6 weeks after the initial decision and the comment was on the need for professional services companies to discharge their duties and obligations properly. The article does not in any way suggest that the SC had considered extraneous matters, whether relating to the allegations of wrongdoing at 1MDB or otherwise when the Respondent made the Decision. Therefore the contention by the Applicant that this action by the Respondent was connected to the allegations of wrongdoings at 1MDB is misconceived.

PROPORTIONALITY OF THE SANCTIONS/PENALTIES

[49] The sanctions/penalties imposed by the Respondent against the Applicant were proportionate to the conduct and nature of the breaches committed by the Applicant. The sanctions imposed by the Respondent is within the regulatory discretion of the Respondent, in line with its duties and responsibilities under the CMSA. The obligations of auditors under Section 276 of the CMSA, particularly its reporting obligations, as a fundamental feature in the operation of capital markets in Malaysia. The Respondent at paragraphs 4.2 and 4.3 in the Review Decision has stated its reasons and the seriousness of the breaches committed by the Applicant (see Exhibit A-19). A reprimand alone in the circumstances, would be wholly inadequate. This Court finds that the decision of the Respondent to impose the said penalties is appropriate and proportionate to the gravity and seriousness of the breaches committed by the Applicant. The SC has not breached the rule of natural justice or acted illegally or unfairly in coming to the Initial Decision and the Review Decision.

CONCLUSION

[50] After having considered the Applicant's application and the submission of the parties, this Court is of the view that the Respondent has not misdirected itself in law, has not taken into account irrelevant considerations or failed to take into account relevant considerations in arriving its decision against the Applicant. The Applicant has failed in any event to demonstrate that the decision of the Respondent or any part thereof amounts to a decision that no reasonable authority could ever have come to. The said Decision does not suffer any infirmities of illegality, irrationality, procedure impropriety or proportionality and the grounds of challenge raised by the Applicant do not disclose any error of law warranting intervention by this Court by way of judicial review.

[51] Accordingly, the Court dismissed the Applicant's application for judicial review with costs of RM20,000.00 as agreed by the parties and subject to allocator's fee.

(MARIANA HAJI YAHYA)
Judge
High Court Malaya
(Special Powers Division 2)
Kuala Lumpur.

Dated: 31 MAY 2021

COUNSEL:

For the applicant - Malik Imtiaz Sarwar, Chan Wei June & Wong Ming Yen; M/s Malik Imtiaz Sarwar, Kuala Lumpur

For the respondent - Brendan Navin Siva & Aerie Rahman; M/s Brendan Siva, Kuala Lumpur

Case(s) referred to:

Peguam Negara Malaysia v. Chin Chee Kow (sebagai Setiausaha Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan and another appeal [2019] MLJU 202

Khiudin Mohd & Anor v. Bursa Malaysia Securities Bhd & Another case [2012] 7 CLJ 407

Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v. Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased) [2017] 5 MLJ, 771, CA

Tunku Yaakob Holdings Sdn Bhd v. Pentadbir Tanah Kedah & Ors [2016] 1 MLJ 200

Legislation referred to:

Securities Commission Malaysia Act 1993, ss. 15, 16

Capital Markets and Services Act 2007, ss. 2, 257, 276(1), (3)(b), 286, 354 (1)(a), (3), (4), 364

Capital Markets and Services (Prescription of Islamic Securities) Order 2012, O. 4