

Key consideration in making third party debt order for an Islamic banking account: An overview of the positions in England and Malaysia

When the claimant in a suit obtains a monetary judgment against the respondent and the respondent refuses or fails to comply, there are several ways to enforce the judgment. In this article, ABDULLAH ABDUL RAHMAN and APNIZAN ABDULLAH provide an overview of a common method of enforcement that is known as the third party debt order.



THIRD PARTY DEBT ORDER

By Abdullah Abdul Rahman & Apnizan Abdullah

In England, the third party debt order proceedings are governed by Part 72 of the Civil Procedure Rules. These proceedings are the successors to the garnishee proceedings under the repealed Rules of the Supreme Court (Revision) 1965. In Malaysia, the term 'garnishee proceedings' is still retained and these proceedings are governed by Order 49 of the Rules of Court 2012.

“ A third party debt order may only be issued in respect of a debt ”

The person in whose favor the judgment is obtained is called the 'judgment creditor'. The person against whom the judgment is entered is called the 'judgment debtor.' A third party may have debt due or accruing due to the judgment debtor. Upon the application of the judgment creditor, the court may make a final order requiring the third party to pay the judgment creditor the amount of any debt due or accruing due to the judgment debtor from the third party. The amount payable by the third party is limited to the judgment amount owing by the judgment debtor to the judgment creditor and the costs of the third party debt order proceedings. The third party would be discharged of his debt obligation to the judgment debtor upon payment to the judgment creditor

to the extent of the amount paid. In Malaysia, the third party is known as the 'garnishee.'

For this purpose, debt that is 'due' means that it is instantly payable. On the other hand, debt that is 'accruing due' means that it is payable in the future but by reason of an existing obligation (see *Merchant International Company v Natsionalna Aktsionerna Kompaniia Naftogaz Ukrainy & Anor* [2014] EWCA Civ 1603 (10 December 2014)).

The third party debt order proceedings are initiated by the judgment creditor applying to the court, without notice to any other party, for an interim third party debt order. Under the interim order, the third party is directed not to make any payment which reduces the amount he owes the judgment debtor below the amount specified in the order until the final third party debt order is issued. Notice will then be given to the third party and the judgment debtor of a further hearing date where the court will consider whether to make the final third party debt order. In Malaysia, the interim order is known as the garnishee order nisi.

Why it is common to take a third party debt order against a bank account?

It is common for a judgment creditor to take third party debt order proceedings against a bank in respect of a conventional non-Islamic current or deposit account maintained by the judgment debtor with the bank. This is because the relationship between a bank and its customer in relation to such current or deposit account is a relationship of debtor and creditor, with the bank as the debtor and the customer as the creditor. When the customer deposits his money with the bank, he actually lends his money to the bank. Thus, the money becomes the property of the bank. The bank's obligation is to



repay the debt upon demand by the customer.

In respect of a current account, whenever the customer demands against the bank to withdraw an amount from the account, the money so demanded constitutes a debt due from the bank to the customer and the bank must repay that amount to the customer (see *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110). In third party debt order proceedings, the requirement for the demand is satisfied by the service of the interim third party debt order on the bank (see *Rekstin v Severo Sibirsko & Co, Bank for Russian Trade* [1933] 1 K.B 47). Therefore, the bank is the third party or garnishee and must pay the judgment creditor as required in the final third party debt order.

The underlying contracts in Islamic banking accounts

The main difference between Islamic banking and conventional banking is that an Islamic bank does not accept or pay interest as practiced in conventional banking. As a result, Islamic banks have employed various types of underlying contracts for the products they offer. The underlying contracts employed for the saving account, current account, fixed-term deposit and investment account include Qard, Mudarabah, Wadiah Yad Dhamanah, Wakalah and Tawarruq.

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The key consideration in deciding whether a third party debt order may be made in respect of an account maintained at an Islamic bank depends on whether the relationship between the Islamic bank and the customer under such an account is a relationship of debtor and creditor and whether there is a debt obligation on the part of the bank towards the customer. Consequently, it is imperative to ascertain the nature of each contract underlying the Islamic banking accounts to make that determination.

It is trite that with regard to placement of money by the customer with the bank, Qard, Wadiah Yad Dhamanah and Tawarruq are examples of contracts that create a debtor and creditor relationship between the parties and a debt obligation on the part of the bank towards the customer. On the other hand, placements of money by the customer with the bank under the Mudarabah and Wakalah Bi Al-Istithmar contracts are in the nature of investment management where the investment manager is not allowed under the Shariah to provide any capital and profit guarantee to the investor. As such, these contracts do not create any debt obligation on the part of the bank.

Accordingly, only accounts that create a debt obligation on the part of the bank towards the customer, such as Qard, Wadiah Yad Dhamanah and Tawarruq, may be subjected to third party debt order or garnishee proceedings. On the other hand, where the underlying contracts of the accounts do not create a debt obligation such as the Mudarabah and Wakalah Bi Al-Istithmar contracts, these accounts may not be the subject of third party debt order or garnishee proceedings. This is notwithstanding that these Mudarabah and Wakalah Bi Al-Istithmar contracts may be employed for the operation of a current, saving or fixed-term account.

Provisions of IFSA 2013

In Malaysia, section 2 of the Islamic Financial Services Act 2013 (IFSA) makes a distinction between an ‘Islamic deposit’ and an ‘investment account’.

To qualify as an ‘Islamic deposit’, the money is required, among others, to be paid and accepted by the bank on terms that it will be repaid in full. On the other hand, to come within the definition of an ‘investment account’, the money is



required, among others, to be paid and accepted by the bank for the purposes of investment on terms that there is no express or implied obligation to repay the money in full. Therefore, it is clear by definition, that there is no debt obligation by the bank to the customer under the investment accounts as defined in IFSA. That being the case, an investment account, as defined in IFSA, may not be subjected to the garnishee proceedings. This would include accounts opened under the principles of Mudarabah and Wakalah Bi Al-Istithmar.

With regard to an Islamic deposit, the nature of the bank’s obligation to repay in full must be examined. If it is based on a debt obligation on the part of the bank, it may be subjected to the garnishee proceedings. If there is no debtor and creditor relationship, the judgment debtor’s account at the bank may not be subjected to the garnishee proceedings. However, accounts opened under the principles of Qard, Wadiah Yad Dhamanah and Tawarruq create a debtor and creditor relationship between the bank and the customer with a debt obligation on the part of the bank. Accordingly, these accounts may be subjected to the garnishee proceedings.

Current and deposit accounts in Malaysia – Issue to be resolved

In Malaysia, O.49 r.(1)(3) of the Rules of Court 2012 has been introduced which defines “any debt due or accruing due” as including a current or deposit account with a bank or other financial institution, whether or not the deposit has matured and notwithstanding any restriction as to the mode of withdrawal. This is a provision which was absent in the Rules of the High Court 1980, which is the predecessor to the Rules of Court 2012 and which has no equivalent in the English Civil Procedure Rules. This

provision has the effect of overcoming any condition or restriction to the mode of withdrawal such as the need for a demand as required in the aforesaid *Joachimson v Swiss Bank Corporation* case.

However, this provision poses an issue as to whether it includes Islamic banking accounts, grouped under the umbrella of ‘current account’ and ‘deposit account’ products, but being accounts where the Islamic bank has no debt obligation to the customer based on the Shariah contracts employed.

“ In an Islamic bank, not all accounts opened by the customers for placement of money with the bank create a debt obligation on the part of the bank ”

Conclusion

A third party debt order may only be issued in respect of a debt. Against conventional banks, this order is normally taken in respect of deposit and current accounts because these accounts create a debt obligation on the part of the bank to the customer. However, in an Islamic bank, not all accounts opened by the customers for placement of money with the bank create a debt obligation on the part of the bank. The nature of the relationship between the bank and the customer created by the opening of the accounts in an Islamic bank must be examined to determine whether the accounts may be subjected to the third party debt order proceedings.⁽²⁾

Abdullah Abdul Rahman is a partner (Dispute Resolution & Islamic Finance) at Cheang & Ariff while Apnizan Abdullah is a PhD candidate at the International Islamic University Malaysia. They can be contacted at abdullah@cheangariff.com and hureen1508@yahoo.com respectively.