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PP v. BESTINO GROUP BHD & ORS AND ANOTHER APPEAL

HIGH COURT MALAYA, IPOH
MOHD RADZI HARUN JC
[CRIMINAL APPEALS NO: AA-42LB-(20-24)-11-2017
& AA-42LB-(25-28)-11-2017]
B 31 JANUARY 2019

CRIMINAL LAW: *Money laundering – Elements of offence – Company and directors charged for offence of receiving deposits from public without valid licence granted under s. 6(4) of Banking and Financial Institutions Act 1989 ('BAFIA') – Whether company's business model fell within definition of 'deposit' under BAFIA – Whether company received 'deposit' while carrying out 'banking business' – Whether company's business required any form of licence issued under BAFIA – Whether company committed any offence of money-laundering – Whether elements of charge proved*

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The second to fifth respondents were the directors of the first respondent, a public limited company. Initially, the first respondent operated its business as follows (i) its main business was the sale and purchase of gold; (ii) the sale of gold was carried out through direct selling or its sales agents; (iii) purchasers would fill up purchasing forms and payments could be made *via* cash, cheques, bank drafts or credit cards; (iv) purchasers would receive their purchased gold either in the form of gold bullion, bar, ingot or gold wafers; (v) purchasers were entitled to (a) one-time only 15% discount of the purchase price payable within one month from the date of gold purchase; (b) 18% discount of the purchase price payable in six payments at 3% monthly; or (c) 2% extra to be paid either for the option in para. (a) or (b) in the event the purchaser decides to keep their gold with the company; (vi) the discounts/rebates were payable in cash or *via* cheques or deposit into the purchaser's bank account; and (vii) the first respondent also provided an option to the purchasers that the first respondent would re-purchase the gold from the purchasers at a price determined by the first respondent or at market value. However, the first respondent's mode of business was altered to the following: (i) purchasers would fill up 'post sale service form' and 'redeemable preference shares ('RPS') application form' to replace their gold invest into RPS; (ii) purchase price of shares starts at RM10,000 for 10,000 units of shares; (iii) purchasers would receive a share certificate depicting the total units of shares which they own and a 36% discount of the purchasable price payable in 12 payments at 3% monthly; and (iv) purchasers could return the certificate to the first respondent and would be paid their purchase price in full. The respondents were charged at the Sessions Court under ss. 25(1) and 103(1) read together with Serial No. 20, Fourth Schedule of the Banking and Financial Institutions Act 1989 ('BAFIA') for the offence of receiving deposits from the public without a valid licence granted under s. 6(4) of the BAFIA. The second to fifth respondents also faced multiple

charges under s. 4(1)(a), read together with s. 87(1)(a), of the AMLATFA. At the conclusion of the prosecution's case, the Sessions Court Judge ('SCJ') found that the first respondent's business model did not fall within the definition of 'deposit' under the BAFIA and, as such, the first respondent had not committed any offence under s. 25(1) of the BAFIA since the business did not require any form of licence issued under the BAFIA. The SCJ held that the appellant ('the prosecution') failed to prove a *prima facie* case against all the respondents and the respondents were ordered to be acquitted and discharged. Hence, the present appeal.

Held (dismissing appeal):

(1) The statutory definitions of the phrases 'deposit' and 'banking business', when read together with ss. 4, 5, 6(4), 25(1) and 25(2) of the BAFIA, would simply mean that for the prosecution to succeed in a charge against the first respondent, for an offence under s. 25(1) of the BAFIA, the prosecution must prove that the first respondent had not merely received 'deposit' but when the first respondent received the 'deposit', it did so whilst carrying out a banking business. The fact that the first respondent received deposits whilst carrying out a banking business without a valid licence issued to the first respondent, under s. 6(4) of the BAFIA, was not an offence. Not merely the act of deposit-taking. (para 31)

(2) The prosecution was sort of 'trapped' by the stringent requirement of ss. 4, 5 and 6(4) and the definition of 'banking business' in s. 2 of the BAFIA which, in essence, requires a licence under s. 6(4) for anyone carrying out a 'banking business'. The definition of 'banking business' is very stringent. All the requirements in paras. (i), (ii) and (iii) in the definition of 'banking business', under s. 4 of the BAFIA, shall be fulfilled before anyone could be convicted for an offence under s. 25(1) of the BAFIA. All the three limbs must be read conjunctively and cannot be read disjunctively. Therefore, if a person is providing only one of the business under the three limbs in s. 2 of the BAFIA *ie* merely providing financing but not collecting deposit, such activity would not be sufficient to constitute 'banking business' under this definition. (paras 32, 33 & 35)

(3) It was unequivocally clear that although the first respondent was 'receiving deposit' and 'taking deposit', it was not receiving deposits on current, deposit and savings accounts or other similar accounts. The first respondent was also not involved in any activity of paying or collecting cheques drawn by or paid in by customers, and the provision of finance. As the first respondent never carried out all of these activities, the first respondent's business did not fall within the definition of 'banking business'. Consequently, the first respondent's business did not require any licence to be issued under s. 6(4) of the BAFIA. It followed that the first respondent had not committed any offence under s. 25(1) of the

BAFIA. The second to fifth respondents, being the directors in the first respondent, had also not committed any offence under s. 25(1) of the BAFIA. (para 38)

(4) The money trail could be identifiable to the monies deposited into the first respondent's bank accounts, and transferred to other accounts either belonging to the first respondent or companies that had business relations and links with the first respondent, with the involvement of the second to fifth respondents. However, the respondents were charged under s. 4(1)(a) of the AMLATFA which does not use the phrase 'any person who engages in an unlawful activity or in any serious offence commits a money laundering offence'. That is why s. 4(2) further provides that a person may be convicted for an offence under sub-s. 4(1) irrespective of whether there is a conviction in respect of a serious offence or foreign serious offence or that a prosecution has been initiated for the commission of a serious offence or foreign serious offence, provided the ingredients under s. 4(1) is proven. All the evidence relied upon by the prosecution during the trials before the SCJ for the charges under the AMLATFA were entirely dependent upon the evidence for the predicate offence against the respondents under s. 25(1) of the BAFIA. Section 4(2) of the AMLATFA was inapplicable against the second to fifth respondents. (paras 44 & 49-52)

Case(s) referred to:

Arba'ei Othman & Yang Lain lwn. PP & Rayuan Yang Lain [2014] 7 CLJ 32 CA ***(foll)***

Herchun Singh & Ors v. PP [1969] 1 LNS 52 FC ***(refd)***

Kerajaan Malaysia v. Mat Shuhami Shafiei [2018] 3 CLJ 1 FC ***(refd)***

Light Style Sdn Bhd v. KHF Ijarah House (Malaysia) Sdn Bhd [2009] 3 CLJ 370 HC ***(foll)***

Pets Global Pte Ltd & Anor v. Eng Hin Aquatics Sdn Bhd & Anor [2016] 1 LNS 771 HC ***(refd)***

PP v. Genneva Sdn Bhd (Criminal Appeal No: W-09-375-10-2016) (Unreported) ***(refd)***

PP v. Ooi Kee Saik & Ors [1971] 1 LNS 113 HC ***(refd)***

PP v. The Gold Label Sdn Bhd & 6 Yang Lain (Criminal Application No: 44-210-2011) (Unreported) ***(refd)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Legislation referred to:

Anti-Money Laundering and Anti-Terrorism Financing Act 2001, ss. 4(1)(a), (2), 70(1), (2), 87(1)(a)

Banking and Financial Institutions Act 1989, ss. 2, 4, 5, 6(4), 25(1), (2), (3), 103(1)(a), 106(1), Fourth Schedule

Evidence Act 1950, ss. 91, 92

Sedition Act 1948, s. 3(1)

For the prosecution - Fatnin Yusof, Nur Ashikin Mokhtar & Wan Nur Atiqah Mior Mohd Zain; DPPs

For the respondents - M Puvaneswaran & K Kumaran; M/s The Chambers of Kumar & Puven

Reported by Najib Tamby

JUDGMENT

Mohd Radzi Harun JC:

[1] The respondents were charged before the learned Sessions Court Judge ("HMS") for multiple offences (as particularised in the paragraphs below) under ss. 25(1), 106(1) and 103(1)(a) of the Banking and Financial Institutions Act 1989 (Act 372) ("BAFIA"), and ss. 4(1)(a) and 87(1)(a) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ("AMLATFA").

[2] At the end of the prosecution's case, the learned HMS decided that the prosecution had failed to prove *prima facie* case against all the respondents for all the charges and ordered that the respondents to be acquitted and discharged.

[3] The appeal before this court by the Public Prosecutor is against that decision.

[4] Upon hearing the submissions of the learned deputies for the appellant and the learned counsel for the respondents, and having the benefit of considering all the documents in the record of appeal, I dismissed the appeal and affirmed the decision of the HMS to acquit and discharge all respondents for all the charges.

[5] The Public Prosecutor now appeals against my finding and below are my grounds of decision.

Background

[6] I shall refer the respondents in their respective names with specific assigned abbreviation for purposes of this judgment.

[7] The respondents were as below:

(i) Bestino Group Berhad ("R1") : Faced with one charge under ss. 25(1) and 103(1)(a), read with Serial No. 20, Fourth Schedule of BAFIA.

(ii) Chong Yuk Ming ("R2") : Faced with one charge under ss. 25(1), 103(1)(a) and 106(1), read with Serial No. 20, Fourth Schedule of BAFIA. Also faced with 54 charges under s. 4(1)(a) read together with s. 87(1)(a) of AMLATFA.

(iii) Goon Koon Lee ("R3") : Faced with one charge under ss. 25(1), 103(1)(a) and 106(1), and Serial No. 20, Fourth Schedule of BAFIA. Also faced with 105 charges under s. 4(1)(a) read together with s. 87(1)(a) of AMLATFA.

(iv) Chang Kuei Geh ("R4") : Faced with one charge under ss. 25(1), 103(1)(a) and 106(1), and Serial No. 20, Fourth Schedule of BAFIA. Also faced with 114 charges under s. 4(1)(a) read together with s. 87(1)(a) of AMLATFA.

(v) Ho Chee Cheong ("R5") : Faced with one charge under ss. 25(1), 103(1)(a) and 106(1), read with Serial No. 20, Fourth Schedule of BAFIA. Also faced with 54 charges under s. 4(1)(a) read together with s. 87(1)(a) of AMLATFA.

[8] For ease of reference, I would regurgitate the facts as I found them in Part B, paras. 1-4 of the grounds of judgment of the learned HMS (refer Jld 1(e) rekod rayuan) as in the succeeding paragraphs.

[9] R1 was established as a privately owned company on 9 July 2006. It went through a number of name-change from the initial name of "Wonderful Success Sdn Bhd" to "Syarikat Bestino Sdn Bhd" on 11 September 2008. On 22 September 2008 it became a public limited company and known as "Bestino Group Berhad". R2, R3, R4 and R5 were the directors of R1.

[10] Before 3 November 2008, R1 operated its business as follows:

(i) its main business is the sale and purchase of gold;

(ii) sale of gold is carried out through direct selling or its sales agents;

(iii) purchasers would fill up purchasing form and payments could be done *via* cash, cheques, bank draft or credit card;

(iv) purchasers would receive their purchased gold either in the form of gold bullion/bar/ingot or gold wafers;

(v) Upon delivery of the gold, the purchaser would be the owner of the said gold;

(vi) Purchasers are entitled to:

(a) One-time only 15% discount of the purchase price payable within one month from the date of gold purchase;

(b) 18% discount of the purchase price payable in six payments at 3% monthly; or

(c) 2% extra to be paid either for the option in para. (a) or in para. (b) in the event that the purchaser decides to keep their gold with the company.

(vii) The discounts/rebates are payable in cash or *via* cheques or deposit into the purchaser's bank account;

(viii) R1 also provided an option to the purchasers that R1 will re-purchase the gold from the purchasers at a price as determined by R1 or at market value.

[11] After 3 November 2008, R1's mode of business was altered to the following:

(i) Purchasers will fill up "post-sale service form" and "redeemable preference shares ("RPS") application form" to replace their gold investment into RPS;

(ii) Purchase price of shares starts at RM10,000 for 10,000 units of shares;

(iii) Purchasers would receive a share certificate depicting the total units of shares they own and a 36% discount of the purchase price payable in 12 payments at 3% monthly;

(iv) Purchasers could return the certificate to R1 and will be paid their purchase price in full.

[12] The charge against R1 under BAFIA read as follows:

> Bahawa kamu, Syarikat Bestino Golden House Sdn Bhd di antara 14 Oktober 2006 hingga 23 Oktober 2008, di 80-8, Jalan Sultan Yusoff, 30000 Ipoh, di dalam Daerah Kinta, di dalam Negeri Perak Darul Ridzuan, telah menerima deposit daripada orang awam tanpa suatu lesen yang sah yang diberikan di bawah subseksyen 6(4) Akta Bank dan Institusi-Institusi Kewangan 1989 (Akta 372) dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 25(1) Akta yang sama dan boleh dihukum di bawah seksyen 103(1)(a) Akta yang sama dibaca bersama nombor siri 20 dalam Jadual Keempat Akta yang sama.

[13] Charges against R2-R5 under BAFIA were as follows:

> Bahawa Syarikat Bestino Golden House Sdn Bhd di antara 14 Oktober 2006 hingga 23 Oktober 2008, di 80-8, Jalan Sultan Yusoff, 3000 Ipoh, di dalam Daerah Kinta, di dalam Negeri Perak Darul Ridzuan, telah menerima deposit daripada orang awam tanpa suatu lesen yang sah yang diberikan di bawah subseksyen 6(4) Akta Bank dan Institusi-Institusi Kewangan 1989 (Akta 372) dan bahawa kamu pada masa berlakunya kesalahan tersebut adalah pengarah syarikat tersebut dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 25(1) Akta Bank dan Institusi-Institusi Kewangan 1989 (Akta 372) dibaca bersama seksyen 106(1) Akta yang sama dan boleh dihukum di bawah seksyen 103(1)(a) Akta yang sama dibaca bersama nombor siri 20 dalam Jadual Keempat Akta yang sama.

[14] As intimated earlier, R2-R5 also faced multiple charges under s. 4(1)(a) of the AMLATFA, read together with s. 87(1)(a) of the Act. To be exact, between the four of them, they faced 327 charges for offences under the said provisions of AMLATFA. The details of each charge could be found in the rekod rayuan at pp. 40-99 Jld 1(a), pp. 100-200 Jld 1(b), pp. 201-302 Jld 1(c), pp. 303-399 Jld 1(d), and pp. 400-464 Jld 1(e).

[15] I shall first deal with the charges under BAFIA.

Finding On The Charges Under BAFIA

[16] I had the benefit of referring to the following documents in the record of appeal:

Volume	Sub-volume	Contents	Page
1	1(a)	Butir2 Rayuan	1-6
	1(a)	Notis Rayuan	7-24
	1(a)	Charges	25-99
	1(b)	-do-	100-200
	1(c)	-do-	201-302
	1(d)	-do-	303-399
	1(e)	Charges	400-464
	1(e)	Petisyen Rayuan	465-492
	1(e)	Alasan Penghakiman	493-500
	1(f)	Alasan Penghakiman	501-607
2	2(a)	Senarai Saksi	1-3
	2(a)	Nota Keterangan	4-100
	2(b)	-do-	101-200
	2(c)	-do-	201-300
	2(d)	-do-	301-400
	2(e)	-do-	401-500
	2(f)	-do-	501-600
	2(g)	-do-	601-700
	2(h)	-do-	701-800
	2(i)	-do-	801-900
	2(j)	Nota Keterangan	901-990
	2(j)	Penyata Saksi Nur Shareena Rosli	991-998
	2(k)	Penyata Saksi SP2-SP11, SP14, SP19-SP21	999-1105
	2(l)	Penyata Saksi SP22, SP23, SP24, SP26, SP27	1106-1213
3	3(a)	Senarai Eksibit	1-21
	3(a)	Eksibit dalam bentuk dokumen	22-100
	3(b) - 3(m)	-do-	
	3(n)-3(z)	-do-	
	3(aa)-3(au)	-do-	

4	4(a)	Hujahan-hujahan	
	4(a)	Kronologi Kes	
	4(b)	Hujahan Pendakwaan di akhir kes Pendakwaan (BAFIA)	
	4(b)	Hujahan Pendakwaan di akhir kes Pendakwaan (AMLA)	
	4(c)	Lampiran Hujahan Pendakwaan (AMLA) (OKT1)	
	4(c)	Lampiran Hujahan Pendakwaan (AMLA) (OKT2)	
	4(c)	Lampiran Hujahan Pendakwaan (AMLA) (OKT3)	
	4(d)	Lampiran Hujahan Pendakwaan (AMLA) (OKT4)	
	4(d)	Hujahan Bertulis Pembelaan di akhir kes Pendakwaan	
	4(e)	Hujahan Bertulis Pembelaan di akhir kes Pendakwaan	
	4(e)	Hujahan Balas Pendakwaan di akhir kes Pendakwaan (BAFIA)	
	4(f)	Hujahan Balas Pendakwaan di akhir kes Pendakwaan (AMLA)	
	4(f)	Hujahan Balas Pembelaan	
	4(g)	Hujahan Balas Pembelaan	
	4(g)	Hujahan Bertulis Pendakwaan	
	4(g)	Hujahan Pembelaan	

[17] The appellant premised its appeal on the following 11 grounds:

(i) Definition of "deposit";

(ii) *Prima facie* case;

(iii) Offence under s. 25(1) is a strict liability offence;

(iv) The principle laid down by the Court of Appeal in *Arba'ei Othman & Yang Lain lwn. PP & Rayuan Yang Lain* [2014] 7 CLJ 32;

(v) HMS had taken into consideration irrelevant issues;

(vi) The letter from Bank Negara Malaysia dated 31 July 2006 that was regarded by the respondents as a form of licence;

(vii) The Court of Appeal decision in *PP v. Genneva Sdn Bhd* (Rayuan Jenayah W-09-375-10-2016);

(viii) The High Court case of *PP v. The Gold Label Sdn Bhd & 6 Yang Lain* (Permohonan Jenayah Bil 44-210-2011);

(ix) Failure to call the investigation officer;

(x) Section 92 of the Evidence Act;

(xi) Other relevant cases

[18] The 113-page written judgment of the learned HMS touched on the following five main issues that culminated in her finding to acquit and discharge the respondents at the end of the prosecution's case:

A (i) R1's business model does not fall within the definition of "deposit" under the BAFIA, and as such R1 had not committed any offence under s. 25(1) as the business does not require any form of licence issued under BAFIA;

B (ii) Failure to call the material witness of the prosecution, the investigating officer for the offence under BAFIA, that had resulted in many factual and legal issues unanswered and led to a loophole and gap in the prosecution's case;

(iii) The non-application of ss. 91 and 92 of the Evidence Act;

C (iv) The discount discontinuance notice (exh. P88) that had altered R1's mode of business commencing 3 November 2008 from gold investments into RPS did not tantamount to deposit-taking;

(v) The High Court decision in *Pets Global Pte Ltd & Anor v. Eng Hin Aquatics Sdn Bhd & Anor* [2016] 1 LNS 771 does not apply to this case. This is D particularly due to the finding of facts that had been distinguished between the two cases. This is apparent in the business model of Genneva Malaysia Sdn Bhd that involved concepts of "park-in" and "buy-back guarantee" which do not appear on R1's business model.

E **[19]** In determining this appeal, I am guided by the applicable principle that had been laid down by a plethora of authorities. Firstly, to warrant appellate intervention, the appellant has to show to this court that the trial judge was plainly wrong. Secondly, the appellate court will be slow in interfering with the decision of the trial judge on findings of fact. This was the reminder of the Federal Court in *Herchun Singh & Ors v. PP* [1969] 1 LNS F 52; [1969] 1 MLRA 382 (FC) where it was held that:

> An Appellate Court should be slow in disturbing such finding of fact arrived at the Judge, who had the advantage of seeing and hearing the witness, unless there are substantial and compelling reasons for disagreeing with the finding: see Sheo *Swarup v. King Emperor* AIR [1934] G PC 227.

[20] That principle had been adopted in numerous other decisions including the Court of Appeal in *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395 where it was held:

H > It is trite law that an appellate court will not readily interfere with the findings of fact arrived at by the trial court to which the law entrusts the primary task of evaluation of the evidence.

[21] Premised on those principles, and upon scrutinising the learned HMS' grounds of judgment, and the record of appeal, I found that the learned HMS I had addressed all relevant issues and her findings and conclusions are correct.

[22] I would not deal with the second, third, fourth and fifth issues as enumerated in para. [18] above as these issues had been sufficiently dealt with by the HMS in parts K, L, M and N of her grounds of judgment. I agree with her findings of fact and law on all those issues as stated in those paragraphs of her judgment. Consequentially, I would not address the appellant's grounds as listed in para. [17](vii), (ix) and (x) above. As for the other grounds raised by the appellant, I dealt with them in paragraphs below.

[23] I shall focus on the first and main issue which is whether R1's business model falls within the definition of "deposit" under the BAFIA. This issue forms the main crux of the charge against R1. As R2, R3, R4 and R5 were the directors in R1, it follows that the finding of this court on R1 would have direct consequence on R2 to R5. It is also my finding that as the charges against the respondents under BAFIA formed the predicate offence to the charges against the R2 to R4 under the AMLATFA, if the answer to the main question as stated above is in the negative, it would follow that there would be no offence committed under s. 25(1) of BAFIA and there will also be no offence committed under s. 4(1) of the AMLATFA.

[24] On this premise, I shall deal only with this sole issue and with respect to the determination of that issue in the appeal against R1. My decision on this issue would be applicable to the appeal against R2 to R5.

"Deposit" And "Banking Business"

[25] Section 25(1) of the BAFIA provides:

> No person shall receive, take, or accept deposits except under and in accordance with a valid licence granted under section 6(4) to carry on banking, finance company, merchant banking or discount house business.

[26] Although "deposit" is defined under s. 2 of the BAFIA, sub-s. 25(3) of the BAFIA provides that for purposes of that s. 25 of the BAFIA, the definition of "deposit" as found in s. 2 is modified and shall be read as follows:

> a sum of money or any precious metal, or any precious stone, or any article which is comprised, in part or in whole, of any precious metal or precious stone, and any other article or thing as may be prescribed by the Minister, on the recommendation of the Bank, received, paid or delivered on terms:
>
> (a) under which it will be repaid or returned, with or without interest or at a premium or discount; or
>
> (b) under which it is repayable or returnable, either wholly or in part, with any consideration in money or money's worth, and such repayment or return being either on demand or at a time or in circumstances agreed by or on behalf of the person making the payment or delivery and the person receiving it, regardless whether the transaction is described as a loan, an advance, an investment, a saving, a sale or a sale and repurchase,

A but does not include money paid *bona fide*:

(A) by way of an advance or a part payment under a contract for the sale, hire or other provision of property or services, and is repayable only in the event that the property or services is not or are not in fact sold, hired or otherwise provided;

B (B) by way of security for the performance of a contract or by way of security in respect of any loss which may result from the non-performance of a contract;

(C) without prejudice to paragraph (B), by way of security for the delivery up or return of any property, whether in a particular state
C of repair or otherwise; and

(D) in such other circumstances, or to or by such other person, as specified in the First Schedule.

[27] Subsection 6(4) provides that "Upon receiving an application and the recommendation of the bank under this section, the Minister may grant the
D licence, with or without conditions, or refuse the licence."

[28] Subsection 6(4) must be read together with ss. 5 and 4 of the BAFIA and the definition of "banking business" under s. 2 of the BAFIA.

[29] Section 5 is a provision relating to submission of an application for a
E licence under s. 6(4) to carry out any of the business under s. 4.

[30] Section 4 provides:

4. (1) No person shall carry on:

(a) banking, finance company, merchant banking, or discount house
F business, unless it is a public company; or

(b) money-broking business, unless it is a corporation,

and holds a valid licence granted under section 6(4) to carry on such business.

G "banking business" means:

(a) the business of:

(i) receiving deposits on current account, deposit account, savings account or other similar account;

H (ii) paying or collecting cheques drawn by or paid in by customers; and

(iii) provision of finance; or

(b) such other business as the Bank, with the approval of the Minister, may prescribe.

I

[31] It is my finding that the above statutory definitions of the phrases "deposit" and "banking business", when read together with ss. 4, 5, 6(4), 25(1) and 25(2) of BAFIA, would simply mean that for the appellant to succeed in a charge against R1 for an offence under s. 25(1) of the BAFIA, the appellant must prove that R1 had not merely received "deposit" but when R1 had received the "deposit" R1 did so whilst carrying out a banking business. The fact that R1 received deposit whilst carrying out banking business without a valid licence issued to R1 under s. 6(4) of BAFIA is an offence. Not merely the act of deposit-taking.

[32] It is my finding that the appellant was sort of "trapped" by the stringent requirement of ss. 4, 5 and 6(4) and the definition of "banking business" in s. 2 of BAFIA which in essence requires a licence under s. 6(4) for anyone carrying out a "banking business". "Banking business" is defined as:

> the business of:
>
> (i) receiving deposits on current account, deposit account, savings account or other similar account;
>
> (ii) paying or collecting cheques drawn by or paid in by customers; **and**
>
> (iii) provision of finance. (emphasis added)

[33] The definition is very stringent. All the requirements in paras. (i), (ii) and (iii) in the definition of "banking business" shall be fulfilled before anyone can be convicted for an offence under s. 25(1) of the BAFIA.

[34] I referred to and concurred with the decision of Rohana Yusof J (as Her Ladyship then was) in *Light Style Sdn Bhd v. KHF Ijarah House (Malaysia) Sdn Bhd* [2009] 3 CLJ 370, when Her Ladyship explained succinctly the extent of the definition of "banking business" in s. 2 of the BAFIA as follows:

> [17] So the question next is whether the Defendant is carrying out Banking Business without Licence and hence contravenes BAFIA. Section 4 BAFIA provides that, no person shall carry on, *inter alia*, Banking Business or Financing Business without holding a Valid Licence granted under Section 6(4) BAFIA.
>
> "Banking Business" is defined in Section 2 to mean:
>
> (a) the business of:
>
> (i) receiving deposits on current account, deposit account, savings account or other similar account;
>
> (ii) paying or collecting cheques drawn by or paid in by customers; and
>
> (iii) provision of finance; or
>
> (b) Such other business as the Bank, with the approval of the Minister, may prescribe;

A From the above definition, a person is carrying out Banking Business only if he is in the business of receiving deposits, paying and collecting cheques drawn by customers and providing financing or such other business prescribed by the Minister. Thus, Banking Business entails the acts of all these three transactions and not just any one of them.

B *From the wordings of Section 2 ALL the three Limbs must be read conjunctively and cannot be read disjunctively as suggested by Encik P.S. Gill. Therefore, if a person is providing only one of the business under the three limbs in section 2, say merely providing financing as in this case, but not collecting deposit, such activity would not be sufficient to constitute Banking Business under this definition.* It follows that, even if it is true that the Defendant is providing financing in the
C Murabaha Sales Agreement, the provision of financing per se by the Defendant is not a Banking Business and requires no Licence under section 6(4) BAFIA. Section 6(4) requires licencing only if a person is carrying out, banking business, Finance companies business, merchant banking business or discount house business ...

D [18] It is to be noted that even the definition of "finance company business" in section 2 entails receiving of deposits and provision of credit, leasing, hire purchase or acquiring rights and interest in hire purchase. In my view there is therefore no basis to say that the Defendant has contravened any of the provisions in BAFIA in the transaction with the Plaintiff ...".

E (emphasis added)

[35] The key phrase in the said decision is "... All the three limbs must be read conjunctively and cannot be read disjunctively... Therefore, if a person is providing only one of the business under the three limbs in s. 2, say merely
F providing financing as in this case, but not collecting deposit, such activity would not be sufficient to constitute banking business under this definition."

[36] This court agrees with the submission of the appellant on the application of the decision of the Court of Appeal in *Arba'ei Othman* (*supra*) for purposes of determining that R1 had committed the act of
G "deposit-taking". But I must stress that the facts pertaining to the business conducted by R1 although was an act of "deposit-taking", it differs with that facts pertaining to "deposit-taking" as found in *Arba'ei Othman* (*supra*). It was an act of "deposit-taking" in the loose sense of the phrase and not as intended by the relevant provisions of BAFIA, and as expounded in *Arba'ei Othman*
H (*supra*). This court agrees with the submission of the learned counsel for the respondents that the main crux of the decision in *Arba'ei Othman* is that s. 25(1) of the BAFIA was enacted to regulate the banking and financial industry by way of licensing so as to prevent the situation where depositors were deprived of the repayment of the principal sum deposited by unlicensed institutions. On the contrary, in case of R1 and the other respondents, the
I goods in respect of which the money was paid (the gold products sold by R1) were delivered to the purchasers. There was no issue of purchasers being deprived of repayment as the consideration given by the purchasers has been exchanged with the goods delivered by R1 under a sale and purchase of goods

arrangement. The net effect of this arrangement was that the necessity to protect depositors of R1 as envisaged by *Arba'ei Othman* (*supra*) does not arise in the instant case.

[37] Applying both the decisions in *Arba'ei Othman* (*supra*) and *Light Style Sdn Bhd* (*supra*), it is my considered view that although the *modus operandi* of R1's activities and businesses could fall within the expanded definition of "deposit" in s. 25(3), s. 25(3) is not a stand-alone provision. As explained succinctly in *Light Style Sdn Bhd* (*supra*), that s. 25(1) and 25(3) must be read together with ss. 4, 5, 6(4) and the definition of "banking business" in s. 2 of BAFIA.

[38] It is unequivocally clear that although R1 was "receiving deposit" and "taking deposit", R1 was not receiving deposits on current account, deposit account, savings account or other similar account. Not only that, R1 was also not involved in any activity of paying or collecting cheques drawn by or paid in by customers, and the provision of finance. As R1 never carried out all of these activities, R1's business does not fall within the definition of "banking business". And consequentially, R1's business does not require any licence to be issued under s. 6(4) of BAFIA. It follows that R1 has not committed any offence under s. 25(1) of BAFIA. Consequentially, R2, R3, R4 and R5 being the directors in R1 had also not committed any offence under s. 25(1) of BAFIA.

[39] On the letter from Bank Negara Malaysia dated 31 July 2006, it is my finding that the ruling by the HMS in accepting that letter as an evidence was correct. To this court, that letter from Bank Negara does not tantamount to a licence as envisaged by s. 6(4) of BAFIA. But that letter works to the positive benefit of R1 as it goes on to show that R1 was truthful and honest in its business transactions. It showed that R1 had taken the necessary actions to ensure that their business is in conformity with the rules and regulations of Bank Negara Malaysia even before they venture into any transactions with the general public.

[40] On the issue of s. 25(1) of the BAFIA being a strict liability offence as raised by the appellant, this court had referred to the decision of the Court of Appeal in *Arba'ei Othman* (*supra*) where it was decided:

> The provisions of ss. 25(1) and 106(1) were drafted to avoid adverse impact on the public resulting from individuals or companies that accept deposits without license that could lead to depositors not receiving their capital returns. Therefore, the offence under s. 25(1) read together with s. 106(1) was a 'regulation for the public welfare of a particular activity. By making the offence under s. 25(1) read with s. 106(1) an offence of strict liability, it would help the enforcement of the said laws to be more effective. In this case, the appellants had failed to prove that the offence committed by PLSB was not agreed upon by them or that they had exercised all efforts to prevent PLSB from committing such offences.

[41] It is the finding of this court that the determination by the Court of Appeal that s. 25(1) of the BAFIA is a strict liability offence is specifically referring to that section when read together with s. 106(1) of that Act. It would mean that if R1 is found guilty under s. 25(1), then R2 to R5 being the directors of R1 would be held liable under the principle of strict liability, unless the statutory requirements under s. 106(1) is successfully proven by them. This is the actual effect of *Arba'ei Othman* (*supra*). This is also in line with the high authority on the law relating to strict liability as decided by Raja Azlan Shah J (as His Lordship then was) in *PP v. Ooi Kee Saik & Ors* [1971] 1 LNS 113:

> In my view what the prosecution have to prove and all that the prosecution have to prove is that the words complained of, or words equivalent in substance to those words, were spoken by accused No. 1 at the dinner party. Once that is proved the accused will be conclusively presumed to have intended the natural consequences of his verbal acts and it is therefore sufficient if his words have a tendency to produce any of the consequences stated in s. 3(1) of the Act. It is immaterial whether or not the words complained of could have the effect of producing or did in fact produce any of the consequences enumerated in the section. It is also immaterial whether the impugned words were true or false. (See *Queen Empress v. Ambra Prasad* [1898] ILR 20 All 55, 69). And it is not open to the accused to say that he did not intend his words to bear the meaning which they naturally bear. (See *Maniben v. Emperor* AIR 1933 Bom 65, 67).

[42] The lay intent of Parliament must be given its full effect by the courts. As s. 3(1) of the Sedition Act was drafted with the clear intent of making the offence a strict liability, it was given the effect as such in that decision. This principle was also referred with approval in the decision of the Federal Court in *Kerajaan Malaysia v. Mat Shuhami Shafiei* [2018] 3 CLJ 1.

Finding On The Charges Under AMLATFA

[43] I now move on to the charges under AMLATFA against R2, R3, R4 and R5.

[44] Upon perusing the documents in the record of appeal, I am satisfied that the money trail could be identifiable to the monies deposited into R1's bank accounts, and transferred to other accounts either belonging to R1 or companies that have business relations and links with R1, with the involvement of R2 to R5.

[45] These are the finding of facts made by this court pursuant to s. 70(1) of the AMLATFA on the balance of probabilities.

[46] But it must be emphasised that s. 70(2) of the AMLATFA provides that s. 70(1) shall only apply on the finding of facts. Section 70(2) therefore further places the burden of proof on the prosecution or appellant to prove its case beyond reasonable doubt.

[47] I agree with the submission of the appellant that s. 4(2) of the AMLATFA clearly provides that:

> a person may be convicted of an offence under subsection 4(1) irrespective of whether there is a conviction in respect of a serious offence or foreign serious offence or that a prosecution has been initiated for the commission of a serious offence or foreign serious offence.

[48] However, it is my finding that the respondents were charged under s. 4(1)(a) which provides:

> "any person who engages, directly or indirectly, in a transaction that involves proceeds of an unlawful activity" commits a money laundering offence.

[49] I found that s. 4(1)(a) does not use the phrase: "any person who engages in an unlawful activity or in any serious offence commits a money laundering offence."

[50] That is why s. 4(2) further provides that a person may be convicted of an offence under sub-s. 4(1) irrespective of whether there is a conviction in respect of a serious offence or foreign serious offence or that a prosecution has been initiated for the commission of a serious offence or foreign serious offence, provided the ingredients under s. 4(1) is proven.

[51] I found that all the evidence relied upon by the appellant during the trials before the HMS for the charges under AMLATFA were entirely dependent upon the evidence for the predicate offence against R1 and R2 to R5 under s. 25(1) of the BAFIA.

[52] Consequential to the earlier order of this court to acquit and discharge R1 and R2 to R5 for the charges under s. 25(1) of the BAFIA, which is conceded by the appellant as a predicate offence to the charges under s. 4(1) of the AMLATFA against R2, R3, R4 and R5, it is therefore my finding that s. 4(2) of the AMLATFA is inapplicable against R2, R3, R4 and R5.

[53] After hearing the learned deputies appearing for the appellant and the learned counsel for the respondents and upon due consideration of their oral submissions, written submissions and the records of appeal, I found myself in agreement with the learned trial judge. I did not find any appealable error in the decision of the HMS to warrant appellate intervention.

[54] Accordingly, I dismissed the appeal for both BAFIA and AMLATFA. I affirmed the decision of the Sessions Court to acquit and discharge all the respondents from all charges.